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OF

THE DEPARTMENT OF THE INTERIOR

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GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JULY 1, 1886, TO JUNE 30, 1887.

VOLUME V.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

PRACTICE—HEARINGS—BURDEN OF PROOF.

JOHN W. HOFFMAN.

The jurisdiction of the local office over a case is not abridged by the fact that it comes before such office on an order for a hearing issued by the Department or the General Land Office.

In proceeding against an entry on a special agent's report the burden of proof is upon the government, and such report is not competent evidence to be considered on final judgment.

Secretary Lamar to Commissioner Sparks, July 6, 1886.

On the 27th of May, 1881, John W. Hoffman made homestead entry of the S. E. $\frac{1}{4}$ of Sec. 5, T. 122 N., R. 63 W., 5th P. M. Aberdeen district, Dakota. After due notice he made final proof, April 22, 1882, showing that he was a single man, twenty-three years of age, a citizen of the United States, and in all other respects qualified to make homestead entry; that he settled upon the land July 25th, and took up his residence thereon October 1, 1881, and resided there continuously until date of final proof; that his improvements consisted of nine acres of land broken and cropped to oats; a frame house ten by twelve feet, constituting a comfortable residence; and a well—the total value of said improvements being \$80.00.

On November 27, 1883—one year and seven months after final proof and payment had been received by the local officers—Thomas W. Jaycox, a special agent of your office, reported said entry fraudulent; whereupon your office, by letter of May 9, 1884, directed as follows:

Action on said entry is suspended, subject to the final determination upon the hearing which you will hold at a time to be fixed after consultation with the special agent, to enable him to appear and present testimony on the part of the government, and at which the entryman will be allowed full opportunity to defend the validity of the claim. Issue

due notice of the hearing, and inform the entryman of the nature and substance of the special agent's report, as above set forth, advising him that in default of an appearance at said hearing his entry will be finally canceled.

Hearing was had August 12, 1884. The only witness for the government was special agent Jaycox, who testified as follows:

On the 27th of October last I visited the claim of John W. Hoffman, and found a board shanty ten by twelve feet, and about forty acres of breaking; the total value of improvements on the claim were about one hundred and fifty dollars. I know nothing about the residence of the claimant on his claim only as I was told by settlers living near there . . . I have made all the effort possible to obtain witnesses to testify in the case, but in every instance they have refused to attend because of threats that had been made against their persons and property . . . The witness stated to me the names of parties who told him of these threats, but I have no reason to think that Mr. Hoffman had anything to do with it. Mr. Hoffman was not, certainly, one of the parties named to me.

Upon this, counsel for claimant moved to dismiss the proceedings, on the ground that the government had failed to establish the allegations of the complaint. The register and receiver sustained the motion, dismissed the case, and reported to your office their action in the matter. Your office, on May 1, 1885, after reciting the facts of the case, decided that the action of the local officers—

In attempting to dismiss proceedings in which this (your) office had exercised original jurisdiction was erroneous. The defendant having declined to submit testimony upon the merits of the case, action must be taken upon the facts as shown, by the testimony for the government *and the agent's report*. The special agent examined the land October 27, 1883, and found it uninhabited; and he filed with his report sworn testimony to the effect that the claimant never resided thereon. Said cash entry No. 2345, of John W. Hoffman is therefore held for cancellation.

In my opinion, the claimant in case at bar did all that was required of him under your order and in law. On the day of hearing he appeared, as he had been cited to appear, "to defend the validity of his claim." In the proceeding attacking the validity of his claim, the burden of proof was upon the government to establish, by competent evidence, the affirmative of the issue. See case of George T. Burns (4 L. D., 62). In that case it was also held that—

The special agent's reports are not evidence, but simply the basis upon which hearings are ordered. Where the special agent has reported an entry, upon which final certificate has regularly issued, illegal or or fraudulent, and a hearing has been ordered under the circular of May 8, 1884, *he should offer the proof in support of his allegations*, after which the entryman should present his defense.

Thereupon the circular of April 22, 1885, upon which you base your decision in the case at bar, was modified, so as to make it "conform to the ordinary rules of judicial procedure." And according to the ordinary rules of judicial procedure, when a party has been cited to ap-

pear at a certain time and place, and answer to a certain charge, and he does so appear, he is entitled to a trial, unless the case be continued upon a proper legal showing made by the other side. In the case at bar the party alleging fraud made no such showing, therefore the case was properly dismissed.

This case is in many respects similar to that of James Copeland (4 L. D., 275). In that case the investigation was made by the same agent; and as herein, after the government rested its case, counsel for the claimant moved to dismiss proceedings; the local officers sustained the motion; your office reversed the action of the local officers, and held the entry for cancellation. In deciding that case I said:

The testimony submitted by the government showed at least *prima facie* that the law had not been complied with by the claimant; and not being rebutted by any evidence proper on that hearing to be considered, it was error to dismiss the case against the government.

The conclusion that it was error to dismiss proceedings in that case was predicated on the fact that testimony had been submitted which showed *prima facie* that the law had not been complied with. In the case at bar, however, no evidence whatever was presented tending to show fraud; the only testimony submitted was that of the government agent, who testified to finding forty acres of land broken where the entryman upon final proof had shown but nine acres, and to one hundred and fifty dollars of improvements where the entryman had sworn to but eighty dollars—neither of which facts are *per se* indicative of fraud—and concluded by announcing that he could obtain no other evidence. There was nothing to rebut, and therefore it was not error to dismiss the proceedings.

I can not concur in the view expressed in the decision appealed from that the register and receiver were without authority to dismiss this case on the motion made by counsel, merely because the hearing had been ordered by your office. I do not think that the fact of your office or the Department having directed that a hearing be had in any case, inhibits the officers before whom the hearing is ordered from proceeding as in other cases. Such order places any case to which it is made applicable, again within the jurisdiction of the register and receiver to whom the order is made, and the proceedings at the hearing should be in accordance with the general and well recognized rules of practice applicable to trials before those officers. If, therefore, as was done in this case, a motion to dismiss is made, raising a question on matters occurring subsequently to the order for the hearing, the register and receiver would have full jurisdiction and authority to grant or deny such motion—their action being of course subject to review by your office, and reversal if found to be based upon insufficient grounds.

Your said office decision of May 1, 1885, is therefore reversed.

DESERT LAND ENTRY—COMPACTNESS.

LIZZIE A. DEVOE.

In determining whether an entry is within the regulations as to compactness its relation to adjacent lands may be properly considered.

Secretary Lamar to Commissioner Sparks, July 7, 1886.

I have considered the appeal of Lizzie A. Devoe from your decisions of September 3d and November 19, 1885, rejecting for lack of compactness her desert land entry No. 2530, for the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 8, and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of Sec. 9, T. 47 N., R. 81 W., Cheyenne District, Wyoming.

Devoe's entry contains four hundred and eighty acres. It measures a mile and a quarter from east to west—somewhat exceeding the dimensions prescribed in the circular of March 1, 1884, (p. 35). You direct that Devoe "adjust" the boundaries of the entry so as to comply more literally with the requirements of the law and the above regulations.

I do not see how this can be done. An examination of the tract-books of your office discloses the fact that such re-adjustment can not be made by dropping two forties from the east end of the tract and taking in an equivalent amount on the north, as said land on the north is, and was before the date of Devoe's entry, filed upon as a pre-emption claim by one Bryan Long. All the land on the south is marked upon the maps and reported in the field notes of survey on file in your office as being, "mountainous"—thus corroborating the allegations in the affidavit accompanying Devoe's appeal that said land could not be rendered arable even by irrigation. There is no way in which the boundaries of the entry can be re-adjusted, except by extending them either north or south, the former of which is unallowable under the law, and the latter impracticable in view of the topography of the country.

The rule prescribed in the circular of March 1, 1884, (*supra*), is by its own terms not a rigid and inflexible one, the statement being explicitly made therein that—

The requirement of compactness will be held to be complied with on surveyed lands when a section, or a part thereof, is described by legal subdivision as *nearly* in the form of a technical section *as the situation of the land and its relation to other lands will admit*.

There being in the case of Devoe's entry no departure from reasonable requirements of compactness, but it being as nearly square "as its relation to other lands will admit," I think said entry should be allowed to stand, and so direct. Your decision is modified accordingly.

TIMBER CULTURE CONTEST—RELINQUISHMENT.

BROWN v. BALDWIN.

The charge as laid by the contestant could not be maintained, but as she subsequently during the pendency of the contest and prior to the intervention of any adverse right, filed the entryman's relinquishment her right to make entry of the tract involved is recognized.

Secretary Lamar to Commissioner Sparks, July 7, 1886.

I have considered the case of *Eva Brown v. John H. Baldwin*, on appeal by the former from your office decision of April 28, 1885, cancelling her timber-culture entry No. 5923, for the SE. $\frac{1}{4}$ of Sec. 21, T. 116 N., R. 67 W., Huron district, Dakota Territory.

The tract described was originally entered by John F. Douglas, October 20, 1882, under the timber-culture act. August 24, 1883, Eva Brown instituted contest against Douglas, alleging as ground therefor that he "had made and executed a relinquishment of said tract, and holds the same for sale and speculation." This relinquishment Brown obtained and filed with the local officers. The relinquishment bears the same date with Brown's affidavit initiating contest, namely, August 24, 1883; but there is nothing among the papers to indicate when it was filed in the local office further than an incidental remark of Brown's attorney, that it was filed "subsequent" to the initiation of contest. The local officers refused to cancel Douglas's entry, but transmitted the papers to your office, November 24, 1883. Your office, April 28, 1884, directed the cancellation of Douglas's entry, but dismissed Brown's contest, holding that "the allegation that a party has relinquished his entry is not of itself a sufficient ground for contest"—at the same time directing the local officers to "hold the land subject to entry by the first legal applicant," thus practically denying to Brown the preference right to enter. Your office also retained upon its files Brown's application to enter. Brown appealed to the Department. The Department, October 20, 1884 (3 L. D., 150) decided that—

If Brown had obtained possession of the executed relinquishment and filed it at the time of making application to enter (there being no other contest pending at the time), said application should have been allowed; but failing to file the relinquishment upon making application to enter, she had at the time of making such application no statutory ground of contest. Nevertheless, under the circumstances,—having done the best she knew to secure the desired right, and no other right having intervened, but the question being one entirely between the applicant and the United States—I see no reason why she should not be allowed the benefit of being considered the first legal applicant, and so direct.

In pursuance of this decision your office, October 24, 1884, directed the local officers to place Eva Brown's application of record. Brown being notified of the departmental decision and your said office order—and her previous application being retained upon the files of your

office—on November 3, 1884, made timber-culture entry No. 5923 for said tract.

Nearly six months prior to this, however, to wit, May 6, 1884, one John H. Baldwin had made timber-culture entry No. 5110 for the same tract. April 28, 1885, your office held Brown's entry for cancellation, in a decision of which the following is all except the introductory statement of the case:

The Hon. Secretary of the Interior, on October 20, 1884, decided substantially as follows in case of Eva Brown, viz: that claimant had no legal right to initiate a contest, and because of this fact could not acquire a preference right to enter the land in controversy, but as no other right had intervened, there was no objection to her being permitted to enter the tract as the first legal applicant.

When the decision cited was made, the Hon. Secretary was not aware of the intervening right of John H. Baldwin, whose timber-culture entry was at that time of record, and was a bar to any other timber entry in that section. When the appeal of Eva Brown was forwarded to the Hon. Secretary by my letter "P" of May 22, 1884, no mention was made therein of the intervening right of Baldwin, because the clerk having charge of the case omitted to make proper annotations upon the tract books.

You will notify Brown that her entry is held for cancellation, and allow the usual time in which to appeal from this decision.

From the said decision of your office Brown appeals to the Department.

The holding of your office, to the effect that the departmental decision of October 20, 1884 (*supra*), allowing Brown "the benefit of being considered the first legal applicant" was conditioned upon the fact of "no other right having intervened" at the date of said decision is untenable. Said decision rested simply upon the conclusion that, although Brown had applied to contest upon a ground which she could not maintain, yet inasmuch as she had subsequently filed a relinquishment, and no adverse right had intervened up to that time, she should be allowed to make entry of the land.

Your office decision holding Brown's entry for cancellation for conflict with that of Baldwin's is therefore reversed.

HOMESTEAD ENTRY—ABANDONMENT.

ANDERSON v. ANDERSON.

The charge of abandonment will not lie where it appears that residence was established and the subsequent absence was the result of judicial compulsion.

Secretary Lamar to Commissioner Sparks, July 7, 1886.

On May 12, 1869, Anders Anderson filed declaratory statement for the NW. $\frac{1}{4}$ of Sec. 30, T. 114, R. 35, Redwood Falls, Minnesota, alleging settlement April 2, the same year. On July 3, 1873, he made timber-

culture entry for the same tract and surrendered his declaratory statement receipt, though it does not appear that the filing was ever canceled. On April 13, 1880, he relinquished his timber culture entry, and on May 17 following made homestead entry for the tract.

On August 17, 1883, Charles Anderson filed affidavit of contest against said entry, alleging abandonment. At the hearing contestant appeared personally and by counsel; contestee was represented by attorney. The testimony disclosed the following facts: That contestee settled on this tract some ten or twelve years prior to the contest, and continued his residence there, with his family, until about February 22, 1882, at which date he was arrested, charged with the murder of his wife, and taken from his homestead to the Renville jail; that he was convicted on said charge, and in May, 1883, committed to the penitentiary at Stillwater, Minnesota, for life; that on said last date his family consisted of seven children, one of whom is the contestant herein, and that four of the children were minors; that the improvements consisted of a house, worth \$900, a good granary and well, one hundred acres plowed, sixty-five acres in crop, eight or nine acres fenced for pasture, and a grove of trees covering from ten to thirteen acres; that claimant had a supply of farming machinery, a considerable number of livestock, and other personal property. That after the arrest of contestee the children one by one left the homestead, finding homes elsewhere, and that in December, 1882, Charles Anderson, the last one remaining, left the land. The testimony further shows that claimant, in January, 1883, while under arrest but prior to conviction, executed a lease of said premises to one John McIntosh, then jailer and deputy sheriff at Renville, for the term of two years, from March 1, 1883, with power to sublet, in consideration of which the lessee agreed to keep the growing timber protected from fire, and the buildings from being destroyed; that McIntosh sublet the full term to one Henry Smith, who, either personally or by subtenant, protected the property and cultivated the land up to the date of hearing. It is further shown that claimant believed he could best secure the homestead for all of his children by making the lease as above stated. On this state of facts the local officers dismissed the contest, and your office on appeal affirmed their action.

While it is true that residence under the homestead law must be continuous and personal, it is also true that residence once established can be changed only when the *act* and *intention* of the settler unite to effect such a change. Anderson had lived on this tract for many years, and up to the date of his arrest had complied with the requirements of the law as to residence and cultivation. His absence from the land since that date is by judicial compulsion, which would certainly be a valid excuse for temporary absence. (*Bohall v. Dilla*, 114 U. S., 47). I am therefore of opinion that claimant's absence from the land under imprisonment for life does not constitute abandonment under the homestead law. No

other question is presented by the record for my consideration. Questions as to the making of final proof need not be here decided.

The decision dismissing the contest is affirmed.

TIMBER CULTURE—PLANTING—CULTIVATION.

HUNTER v. ORR.

Sowing tree seeds broadcast cannot be held in compliance with the law, as it renders cultivation impracticable.

Secretary Lamar to Commissioner Sparks, July 9, 1886.

I have considered the case of Otis M. Hunter v. William M. Orr, as presented by the appeal of the latter from your office decision of February 11, 1885, holding for cancellation his timber-culture entry for the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, of Sec. 32, T. 11 N., R. 1, E., Lincoln, Nebraska.

It appears that said entry was made February 23, 1878, and that Hunter filed his affidavit of contest December 18, 1883, charging that "Wm. M. Orr has no trees on above described land, nor has there been any cultivation within the last two years, nor has there been any trees planted on said tract within that time."

Hearing was set for January 24, 1884, at which time both parties appeared with counsel and witnesses, and the trial proceeded. A large amount of testimony was taken, upon the hearing and consideration of which the register and receiver found that contestee had failed to comply with the law in the matter of planting and cultivation. Orr appealed, and your office affirmed the finding of the local office.

I have carefully examined the testimony, which I find to be very conflicting—witnesses for contestant testifying that there are but few trees on the tract, some putting the number which they were able to find upon examination as low as a dozen or thereabouts, and stating that these could only be found by searching in the weeds and grass; while witnesses for contestee testify to having found growing on the land a large number of trees, ash and elm, and that from their examination they are satisfied that there are many more than the law requires.

The examinations referred to by the witnesses for the contestee, it appears, were made at the request of and in company with Orr, the contestee—some of the witnesses testifying that they could see no trees on the tract until told and showed by Orr how to find them, viz, by getting down and parting the weeds and grass in which they grew. In this way they examined certain spots over the tract, and from such examination drew their conclusions, or made their estimates as to the total number of trees.

While the testimony is contradictory on many points, and especially so as to the number of trees, it is in some respects free from conflict. It is agreed that such trees as were found were small, and that they were hidden from view by the dense growth of grass and weeds; that the seeds from which they had grown, instead of having been planted, within the ordinary meaning of that term, had been sown broadcast and harrowed in, and then left to vie with weeds and grass in their growth, there having since said sowing been no cultivation. Weeds and grass and trees were from that time left to grow together.

It is manifest that should the seeds, or any considerable portion thereof, thus placed in the ground grow, the trees would be so distributed on the tract as to render ordinary cultivation impracticable.

The reasons assigned by claimant for sowing the seed broadcast instead of planting in the ordinary way are, that he planted in the usual way within the time prescribed by law after his entry, and that because of the alternate swampy and dry or baked condition of the land, together with the peculiar character of the soil, the seeds planted failed to grow, and that he then determined to, and did, in the spring of 1882, try sowing broadcast with better success, the weeds and grass serving as a mulch to protect the trees. While it is true that tree culture, to secure a successful growth requires different methods and treatment in different sections of the country, and under the varying circumstances as to soil, climate, etc., it is equally true that the law contemplates that the trees, seeds or cuttings should be so placed in the ground as to render practicable whatever method of cultivation the character of the changing seasons may render advisable. It is by no means clear from the evidence in this case that the number of growing trees is such as would meet the requirements of the law, and I do not think there has been or can be such tillage of the ground upon which the seeds have been sown broadcast as would constitute cultivation of trees within the meaning and intent of the law.

Such a course as that pursued by Orr amounts practically to leaving such trees as may start after a broadcast sowing to grow wild, without any care or protection whatever by the entryman, and then, if approved, would allow him to come in and say that he did nothing in the way of protection or cultivation because nature by causing the growth of weeds and grass about and over the trees, furnished an all-sufficient protection—in fact, better than could result from any act of his.

This would be trifling with the law, and such a condition of fact would in my judgment furnish that evidence of want of good faith which would warrant the cancellation of an entry so held.

The course indicated has been substantially that pursued by Orr, as shown by the testimony and admitted by himself. Finding no reason for disturbing the decision appealed from, I affirm the same.

SOLDIERS' ADDITIONAL HOMESTEAD.

OWEN MCGRANN.

Certificate of right to make additional entry can issue for only the difference between the original entry and one hundred and sixty acres.

The original entry being canceled for failure to make final proof, residence and cultivation will be required in case of entry under additional certificate.

Secretary Lamar to Commissioner Sparks, July 10, 1886.

With your letter of August 1, 1885, were transmitted the papers relative to the application of Owen McGrann for an additional homestead claim under the provisions of Section 2306 of the Revised Statutes.

The record shows that, on June 13, 1863, McGrann made a homestead entry, No. 88, of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and Lot 7 of Sec. 20, T. 114 N., R. 26 W., Henderson (now Redwood Falls) land district, Minnesota. Said entry embraced 98.50 acres, and was canceled for failure to make final proof within the time prescribed by law. On December 9, 1884, McGrann purchased the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 20, under the provisions of the second section of the act of Congress approved June 15, 1880 (21 Stat., 237).

It was decided by your office "that as the original entry was for 98.50 acres, a certificate of right could only be issued for 61.50 acres, and the conditions of said certificate would require residence upon and cultivation of land entered thereby." The time of filing said application does not appear in the record, but the affidavit accompanying the same is dated December 15, 1882, and the request of your office to the Adjutant General, U. S. Army, for information, is dated March 15, 1883, and, hence, I assume that the application is within the provision of departmental circular, dated February 13, 1883 (1 L. D., 41).

Section 2306, R. S., provides that "Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres." Under the provisions of said act, since the original entry was for 98.50 acres, McGrann is entitled to enter as an additional homestead only 61.50 acres, the difference between the amount of the original entry and one hundred and sixty acres.

It is strenuously insisted by appellant that said Sec. 2306 does not require residence and cultivation upon the tract entered, and that by reason of the purchase of a part of the land embraced in his original entry under said act of June 15, 1880, McGrann complied with the law as to his original entry, and is entitled to a certificate free from conditions. But this contention cannot be maintained.

It is clear that the law contemplates that the entryman shall comply with the requirements of the homestead law as to residence upon and

cultivation of the land covered by his original entry, and when it is shown that the entryman has abandoned his original entry, then he must show the required residence and cultivation of the tract covered by the additional entry, in order to complete title thereto. This was expressly ruled by this Department in the case of John W. Hays (3 C. L. O., 21).

While it may be conceded that the act of June 15, 1880, is a remedial statute, and, therefore, should be construed liberally, yet I do not think it was ever intended by Congress to extend the provisions of that act to cases like the one at bar. Said decision of your office is therefore affirmed.

HOMESTEAD—ACT OF JUNE 15, 1880.

STARBUCK *v.* KISTLER.

The second section of this act secures the right of purchase only to transferees who became such prior to the passage of said act.

Acting Secretary Muldrow to Commissioner Sparks, July 13, 1886.

On November 11, 1879, John W. Kistler made homestead entry for W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 22, T. 3 N., R. 29 W., North Platte (now McCook) land district, Nebraska.

July 9, 1884, Moses T. Starbuck initiated contest, alleging abandonment. Hearing was set for August 22. On that day one J. E. Cochran appeared, asked to be made party defendant, and to be allowed to purchase under section two of the act of June 15, 1880, alleging that on August 1, 1884, he had purchased from said Kistler all his right, title and interest to said homestead for a valuable consideration and in good faith. Without passing on the rights of Cochran, the local officers proceeded to hear the testimony in the case. Claimant did not appear. On September 30th following the local officers recommended cancellation of said homestead entry on the proof submitted, and transmitted with the papers the application of Cochran, for instructions.

Your office held said entry for cancellation on the proof, and denied Cochran's application to purchase. I am of opinion that such action was proper. The second section of said act of June 15, 1880, provides: "That persons who have *heretofore* under any of the homestead laws entered lands properly subject to such entry or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing may entitle themselves to said lands by paying the government price therefor," etc. This section secures the right of purchase only to transferees, who became such *prior* to the passage of said act. The transfer in this case was made August 1, 1884, and hence does not fall within the provision of said act.

For the reason herein stated, said decision is affirmed.

PRACTICE—AFFIDAVIT OF CONTEST.

PEDERSON v. JORGENSEN ET AL.

The omission of the venue from an affidavit of contest is not such a defect as to invalidate the contest, nor can a stranger to the record take advantage thereof.

Acting Secretary Muldrow to Commissioner Sparks, July 14, 1886.

On September 4, 1877, Hendrik Jorgenson made timber-culture entry for the NE. $\frac{1}{4}$ of Sec. 30, T. 109, R. 43, Tracy, Minnesota. On January 21, 1884, Charles E. Carlson brought contest against the same for failure to comply with the law. On the same day, but later, Cornelius Pederson applied to contest said entry, on the same grounds, alleging that the prior contest of Carlson was void in that there was no venue in the affidavit. The local officers rejected the application to contest. On appeal your office affirmed the action of the register and receiver, and held that "Carlson, who furnished sufficient information to give him a *prima facie* standing, should not be deprived of an opportunity to complete his case on the ground of a mere technicality, and you will therefore allow him to amend by filing a new affidavit of contest." Pederson alone appealed.

The ruling of your office as far as it affects him was correct, and is hereby affirmed.

The omission of the venue from the affidavit of contest, it being perfect in all other respects, was not such a defect as to render the contest void, or to allow a stranger to take advantage of it.

RAILROAD GRANT—RES JUDICATA.

GRIFFIN v. CENTRAL PAC. R. R. CO.

A decision of the General Land Office, not appealed from, erroneously holding that a tract of land passed under the grant, will not preclude the Department from considering the legal status of such tract, under said grant, on the subsequent application of a new party claiming the right of entry.

Acting Secretary Muldrow to Commissioner Sparks, July 15, 1886.

This case comes before me on appeal by the Central Pacific R. R. Co., from the decisions of your office, dated, respectively, September 11 and October 1, 1884, rejecting its claim to the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 6. E., M. D. M., Marysville, California, and awarding the same to William Griffin.

The tracts involved are within the primary limits of the grant to the Central Pacific Railroad Company, under the acts of Congress approved July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), the right of which is held by your office to have attached to its granted lands in

this district, at the date of the latter granting act, its road having been definitely located at a date prior thereto. The withdrawal for the benefit of the grant became effective in the Marysville district, October 3, 1864.

The township plat was filed in the local office September 18, 1868.

The records show that one Alfred Hodnett filed pre-emption declaratory statement, No. 5562, for the tracts in question December 17, 1863, alleging settlement thereon November 1, 1857. This claim was never perfected.

Subsequently, to wit, on December 7, 1873, one Felix G. Hendrix made application to file a pre-emption declaratory statement for the lands herein, and a hearing was had January 15, following, for the purpose of determining whether or not the tracts were excepted from the grant to the railroad company, by reason of the said claim of Hodnett. The evidence adduced at that hearing clearly established the fact that Hodnett settled upon this land at or about the time alleged in his said declaratory statement; that he was a qualified pre-emption claimant; and that he had continuously occupied and improved the same up until some time in the year 1870, when he abandoned it. By decision of your office, dated July 31, 1880, the application of Hendrix was rejected, it being held—following the ruling in the “Gates” case (5 C. L. O., 150)—that although Hodnett had had a claim which might have been perfected, and would then have been a bar to the railroad grant, yet it having been abandoned by him in 1870, the right of the company then became effective, and by the doctrine of relation was carried back to the date of the grant. From this decision there was no appeal, and the case was finally closed November 1, 1880.

The decision in the “Gates” case (*supra*) was overruled by my immediate predecessor in the famous “Perkins” case (1 L. D., 357), and it was therein announced that lands within the granted limits to which a pre-emption claim had attached at the time the line of the road was definitely fixed were not granted at all, even though the claim should be afterwards abandoned. This ruling has been followed since in the Department, and is now well settled.

On the 16th of April, 1884, the local office at Marysville rejected the homestead application of Griffin (the appellee herein), holding that the land having been awarded to the railroad company by the Commissioner's decision of July 31, 1880, before mentioned, the case was *res adjudicata*, and no jurisdiction remained in the United States government to make further disposition of the lands involved. From this decision Griffin duly appealed, and the same was reversed by your office on September 11, 1884, in the decision herein appealed from. The before mentioned decision of October 1, following, also appealed from, was an overruling of a motion for review and reconsideration, filed on behalf of the company, of said decision of September 11 preceding, which was still adhered to.

There is but one question of importance involved in this case, as pre-

sented by the appeal, viz: whether the question as to the right of the company to the tracts in dispute is *res adjudicata*, and, therefore, beyond the jurisdiction of the Department.

With regard to this question, I am decidedly of the opinion that the case is not *res adjudicata*. The ruling of your office of July 31, 1880, relied upon by the company to sustain its case, was clearly an erroneous exposition of the law in relation to such matters. That decision gave the railroad company no greater rights as against the United States than it theretofore possessed. The land did not pass to the company under its grant, and therefore it never took title to it. The question is now one solely between Griffin and the government. True, so far as the pre-emption claim of Hendrix is concerned, it is forever at an end. It is *res adjudicata*. But that has nothing to do with the claim of the United States government. *Whitnall v. Hastings and Dakota Railway Company* (4 L. D., 249).

Now, from the grant to this company, under the acts of Congress before referred to, were excepted all lands to which a pre-emption or homestead claim had attached at the time the grant took effect. As before stated, both at the date of the grant and also at the date of the withdrawal, the lands in question were occupied and improved by a *bona fide* pre-emption claimant, who some years afterwards abandoned his claim. They were therefore excepted from the grant to the company by the terms of the granting acts, and do not, and cannot, be held to belong to the company. See "*Perkins*" case (*supra*), and many later departmental decisions. The lands not having passed to the company under its grant, it cannot be heard to object to any disposition the United States may choose to make of them.

I therefore affirm your office decision rejecting the claim of the company to the land involved. Some question having arisen between Mr. Griffin and another party claiming to have purchased the improvements of Hodnett, as to priority of right, and that question not having been passed upon by your office, I return herewith all papers in the case for such further action as may be necessary in the premises.

SCHOOL LAND—PRE-EMPTION.

JOHN JACK.

A filing on a school section being held for cancellation on special agent's report charging want of settlement, the pre-emptor is allowed to furnish final proof in view of alleged settlement before survey and continuous residence thereafter, though the filing was not placed of record within the statutory period.

Secretary Lamar to Commissioner Sparks, July 21, 1886.

By letter of September 16, 1884, your office held for cancellation the pre-emption declaratory statement of John Jack, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 36, T. 9 S., R. 12, Helena, Montana Territory.

This action was based upon the report of a special agent to the effect that the claimant had never made an actual, *bona fide* settlement upon the tract in question. The appeal of Jack is now before me for consideration.

The township plat was filed in the local office November 6, 1872. The declaratory statement was filed February 18, 1884, alleging settlement in May, 1882. In his appeal to this Department Jack furnishes affidavits to the effect that his actual settlement was made upon the land in 1871, before the filing of the township plat, and that his residence thereon has been continuous up to date.

In view of the statements made in these affidavits, I deem it advisable that the claimant be allowed an opportunity to prove their truth. He will accordingly be given sixty days from receipt of notice of this letter to make final proof for the land claimed by him, at which time a special agent of your office should be present in the interest of the government. If claimant shall fail or refuse or comply with the above directions his filing should then be canceled.

The decision of your office is modified accordingly.

PRE-EMPTION—SECOND FILING.

BYWATER *v.* HILL ET AL.

A pre-emption claim based on the settlement and filing of one who had previously exhausted his pre-emptive right is illegal, and the transmutation thereof to a homestead entry will not exclude an intervening adverse claim.

Secretary Lamar to Commissioner Sparks, July 22, 1886.

I have considered the case of Charles M. Bywater *v.* W. C. Hill and J. Vance Lewis, involving Lots 7, 8, 11 and 12, Sec. 4, T. 24 N., R. 4 E., Olympia, W. T., on appeal by Bywater from your predecessor's decision of August 29, 1883, holding his homestead entry thereon for cancellation.

It appears from the record that Bywater applied to file a declaratory statement for said tracts on May 8, 1879, alleging settlement October 7, 1877. Hill and Lewis applied to locate Porterfield scrip on said tracts on January 8, 1880. At said dates the land was covered by a claim of the Townsite of Seattle, which however was held by the Secretary of the Interior on October 26, 1881 (1 L. D., 501), to be invalid, and Bywater was allowed to file as of date his said offer was made. This he did November 26, 1881, by declaratory statement No. 5313; and on December 19 following he transmuted his filing to homestead entry No. 4113. By his aforesaid decision and by that of July 22, 1882, the Secretary also allowed Hill and Lewis to locate their scrip, as of date of their said offer, subject however to Bywater's right as a pre-emptor; and this they did August 28, 1882.

A contest between the parties was thus brought about, and hearing was had in December 1882, at which the scrip locators attempted to show, first, that Bywater had exhausted his pre-emption right by certain prior filings in Minnesota, and, second, that he had failed to settle on and inhabit the land as required by the pre-emption law. For a reason not stated, the local officers ignored the question of the effect of the prior pre-emption filings, but found that Bywater had complied with the law in respect of residence, and awarded him the land. When the case came before your office on appeal, the question of the prior filings was again ignored, but it was held that Bywater had failed to comply with the law in the matter of residence, and his entry was held for cancellation. I do not find it necessary to enter into a discussion of the evidence upon the question of Bywater's settlement and residence, but will dispose of the case on that relating to the alleged prior filings.

In his testimony at the hearing, Bywater admitted that he had made a pre-emption filing in Minnesota about June 1873, and that he had relinquished it subsequently for a consideration of \$900 or \$1000. (I understand that at page 41 of the trial record he corrected his testimony at page 12 in regard to said relinquishment). I have caused the records of your office to be examined, and it appears therefrom that one Charles M. Bywater filed declaratory statement No. 20,254 for the NW. $\frac{1}{4}$ of Sec. 4, T. 107, R. 36, New Ulm, Minn., alleging settlement June 10, 1870; and that on June 25, 1873, Charles M. Bywater filed declaratory statement No. 22,356 at the same office for the NW. $\frac{1}{4}$ of Sec. 24, T. 107, R. 36, alleging settlement June 20, 1873. The latter filing was canceled by letter ("C") of May 13, 1878, for relinquishment; and the relinquishment, which is on file, was executed September 29, 1877, and is unmistakably in the hand-writing of C. M. Bywater the claimant in this case.

It therefore appears from the record before me that Bywater held a tract of land in Minnesota under the pre-emption law from June 1873 to September 1877, in which last-named month (he stated in his testimony) he removed to Washington Territory. In my opinion he had thereby exhausted his pre-emption right, and his pre-emption settlement and filing on the land herein in controversy were illegal (J. B. Raymond, 2 L. D. 854). This was the status of his claim on January 8, 1880, when Hill and Lewis made their scrip location; and such a claim could not be validated by the subsequent transmutation to a homestead entry, so as to appropriate the land against them (Brooks v. Tobien, 4 L. D., 560). For these reasons your said office decision is affirmed.

I call you attention to the fact that this land appears to be a part of the Maynard donation claim, and that the record shows that a request to issue patent for it to the heirs of Lydia Maynard was on February 27, 1885, refused consideration by my predecessor, because of the pendency of a certain suit in the Supreme Court of the United States involving her title thereto. In the letter transmitting his views to your office is the following passage: "You will please take no action looking to a disposition of these lots until said suit has been decided."

*PRACTICE—REVIEW; SURVEY—ACCOUNTS.***J. R. GLOVER.**

The decision of the Department rejecting a survey and refusing to pay therefor will not be reviewed, where it appears that application for such action was not made within the proper time, and that prior to such application the townships covered by said survey had been re-surveyed and the work paid for under a subsequent contract.

Acting Secretary Muldrow to Commissioner Sparks, July 22, 1886.

On May 26, 1877, the United States Surveyor General for California executed a contract with Deputy Surveyor J. R. Glover for the survey of Townships 18 to 25 N., Range 10 W., Mount Diablo Meridian, California.

On April 14, 1879, Secretary Schurz made a decision relative to the approval of the accounts of Deputy Surveyor Glover for the survey of these townships, and also upon the question of the approval of said surveys, in which he held that said surveys were not in conformity with law, but in direct violation thereof, and that his accounts for said services should be rejected.

In the decision referred to Secretary Schurz said:

"Viewing the work as a whole, it will be seen that Mr. Glover executed the survey of the 4th standard line in such a manner as to throw the deficiency into the townships which he had the contract for subdividing, instead of allowing it to fall in the place where it naturally belonged. In so doing he violated the law.

"1st. By deducting the deficiency from the east, instead of the west side of the townships north of the 4th standard line; and (2) by dropping a row of sections from the east side of the 4th standard line, and by running the lines of survey in the wrong direction.

* * * * *

"I am of opinion that Mr. Glover is not entitled to pay for the survey of these townships, and that the survey of townships 18 to 25 north, 10 west, should be rejected."

It will be seen from the decision above referred to that Secretary Schurz decided (1), that these surveys were improperly executed, and should be rejected, which was accordingly done; and (2) that Glover was not entitled to pay for that service.

No further action was taken in the matter by Mr. Glover, until nearly six years thereafter, when he filed the present motion, "invoking renewed supervisory action and review of said decision . . . upon matters arising since the date of such rejection," to wit: At date contemporaneous with the Glover surveys, Deputy Surveyor Hanson had executed other surveys in California in precisely the same manner, which though rejected were afterwards re-instated and approved; that in 1883, the Commissioner approved similar surveys of townships made

fractional in the same manner, viz: by the junction of the Mount Diablo and Humboldt Meridian; that numerous surveys have since been approved made in precisely the same manner as the Glover survey, and that instructions have since been given for the survey of fractional townships in the same manner.

I do not think that the grounds urged in this motion for review are sufficient to take the case out of the general rule requiring that all motions for review shall be made within thirty days from date of notice of decision.

It appears from the record that the surveyor general of California approved and forwarded the surveys of Glover and Hanson about the same time, and at the same time forwarded a protest from Robert Gardner, charging fraud in the surveys of Glover and Hanson, and that the fractional townships were surveyed so as to drop the 36th section in the interest of a land ring. It is true that Hanson's surveys were rejected because the lands were not of a surveyable character, and not because section 36 was omitted in the surveys, but it does not follow that because the surveys were rejected upon a ground in itself sufficient, that the other objection to the survey was approved. Hanson waived his right of appeal from the Commissioner's decision, and also all claim for pay for his surveys, and subsequently the Commissioner directed the surveyor general to expunge the cancellation of the Hanson surveys and restore the triplicate plats to the U. S. Land Office. This action of the Land Department was induced solely from the fact that Hanson had waived all claim against the United States and had been compensated for his services by the State of California, and not from an approval of his survey.

This subsequent action in regard to the Hanson surveys, and the alleged subsequent action of the Commissioner in regard to similar surveys, will not take this case out of the general rule that all motions for review must be made within thirty days from notice of decision, except when based on newly discovered evidence.

Besides, it appears from the report of your office that since the date of the decision of Secretary Schurz above referred to, and prior to the filing of this motion for review, that the townships covered by the Glover surveys have been resurveyed under another contract, and that the accounts for such surveys have been audited and paid. This fact alone precludes the Department from taking further action in the matter, and is a sufficient ground for refusing to grant the review prayed for.

The application for review is denied.

DESERT LAND ACT—FINAL PROOF.

PETER FRENCH ET AL.

The acquisition of land under this act by any one person is limited to six hundred and forty acres whether taken by original entry or assignment.

Final proof purporting to be made by the original entryman but submitted and sworn to by one acting as attorney in fact is illegal and invalid.

Secretary Lamar to Commissioner Sparks, July 23, 1886.

I have considered the appeal of Peter French *et al.*, from certain decisions of your office, hereinafter more particularly specified, adverse to said French and his assignors.

Said appeal involves five desert land entries, made at the Lakeview land office, Oregon, and designated as follows:

Entry of James A. Jennings, final certificate No. 2, dated September 23, 1880, for 639.69 acres; J. M. Dedman, final certificate, No. 3, dated December 20, 1880, for 639.78 acres; Isaac W. Laswell, final certificate, No. 4, dated December 20, 1880, for 599.33 acres; John J. Hallett, final certificate, No. 5, dated December 20, 1880, for 640 acres; Peter French, final certificate, No. 8, dated August 14, 1882, for 610.70 acres.

Of the claims covered by the above mentioned entries, two, those of Jennings and French, were initiated by declarations dated September 24, 1877; two, those of Dedman and Hallett, by declarations dated December 20, 1877; and one, that of Laswell, by declaration dated January 7, 1878.

Your office, by its letter of June 8, 1883, informed the register and receiver that all of the entries named had been canceled for fraud, in that (1) the lands were non-desert in character, and (2) the entries of Jennings, Dedman, Laswell, and Hallett were made in the interest of French.

Said action was based upon the report, dated April 4, 1882, made to your office by Special Agent R. V. Ankeny. The register and receiver were directed to allow to claimants sixty days from date of notice within which to show cause why their entries should be re-instated. November 6, 1883, six months after the cancellation, the local office addressed to your office a letter stating that the several parties had been duly notified of the action taken, and that they had made no response. Thereupon your office, by its letter of February 13, 1884, to the register and receiver, declared its judgment of cancellation final, and directed that the lands involved be held subject to entry by the first legal applicant. Subsequently application was filed in your office in behalf of French, asking the re-instatement of all the entries canceled as above. This petition, filed in October, 1884, averred want of notice of the cancellation, and was accompanied by an affidavit of French that he is entitled not only to the land covered by his own entry, but that he is the owner by purchase of the entries of Jennings, Dedman, Laswell and Hallett. Affidavits of certain other persons were also filed for the purpose of

showing that the lands had been desert in character, and that they had been reclaimed as required by law.

Prior to the receipt of the petition, to wit, on August 1, 1884, your office, at the request of counsel, had by telegraph directed the register and receiver to make no further disposition of the lands in question until so instructed.

After further proceedings bearing upon the question of notice, you, by your letter of April 29, 1885, to the register and receiver, declined to re-instate the entries and directed the local office to no longer withhold the lands from entries or pre-emption filings by other qualified applicants.

The appeal now before me is from the several decisions of June 8, 1883, February 13, 1884, and April 27, 1885, above mentioned.

Said appeal sets forth and proceeds to argue several specifications of error, which it is claimed exist in the decisions appealed from. For the purpose of this decision it is not now necessary to consider all of these specifications. Among them is one to the effect that the decision of your office of February 13, 1884, declaring that of June 8, 1883, which canceled the entries in question, final, was without authority and not binding upon appellants, because made without notice to them.

It has constantly been alleged and is stated under oath that notice of the decision of June 8, 1883, canceling said entries, was never received by either French or his assignors, and he states that the matter was first brought to his notice in June or July, 1884, by one Cushman entering upon a portion of said lands for the purpose of making improvements thereon.

December 20, 1884, your office called upon the register and receiver to furnish proof of service of notice of the cancellation of said entries. Those officers replied, under date of February 23, 1885, that they had mailed to the several entrymen notices of said cancellation, as directed by your office letter of June 8, 1883, but that they have no means of proving that said notices, or any of them, were received.

On this showing, and from the proceedings subsequently had, I am unable to find that the parties appellant have had the benefit of the sixty days' notice contemplated by your office decision of June 8, 1883, and I therefore think your action denying a hearing was error.

Your attention is invited to a peculiar feature, which has not been adverted to in any of the several decisions rendered by your office in this case. It is this: It seems that when final proof was made, claimants Jennings, Dedman, Laswell and Hallett did not personally appear, but that they were represented by French, who appeared with power of attorney from them severally to do, with respect to the land covered by their respective claims, whatever they themselves might do if present.

In answering the questions usually propounded to claimants in making final proof, French so personated his principal in each case as to answer said questions in the first person as if he were the claimant or

entryman. Having answered the questions in this way he subscribed and swore to the same as the claimant, adding to the signature of such claimant the words, "by Peter French, attorney in fact."

The final proof as taken and submitted in the four cases named is on the facts above recited illegal, invalid and without effect, and should for that reason be rejected.

Although having proceeded in the manner indicated, it is now stated by French, and by at least two of the assignors, that he purchased from them the entries in 1879, while final proof was not offered until the fall of 1880. It would, therefore, appear that at the date of said final proof French attempted to occupy the dual position of attorney-in-fact for the original claimants and their assignee. I have already said that the final proof submitted by him as attorney for Jennings, Dedman, Laswell, and Hallett is valueless. As to the claim now set up by French that he is and was at the date of final proof, and prior thereto, the assignee of the parties named, and that he is for that reason entitled to patents covering the four tracts embraced in the claims as originally made by them, it need only be said that while assignments of desert land entries before final proof were recognized by the Department until its decision of April 15, 1880, in the case of S. W. Downey (7 C.L.O., 26), it has been very distinctly ruled that the acquisition by any one person of land under the desert land law is limited to six hundred and forty acres. See case of Joab Lawrence (2 L. D., 22), and that of David B. Dole (3 L. D., 214). French made an entry in his own name for 610.70 acres. It is therefore clear that in no event can he be recognized as the assignee of the parties named, or any of them. If any of these four entries shall ever be re-instated it must be upon a showing made by the parties originally claiming and not by French. Since they claim want of notice of the adverse decisions of your office, and it does not appear that they received notice, they will be given an opportunity to appear at the local office on a day to be named, with a view to the submission of such testimony as they may have to offer in support of their respective claims, and to offer final proof in lieu of that hereby rejected, showing their compliance with the law in all respects.

French will also be notified that at the same time a hearing will be had in his case for the purpose of examining as to the charges of fraud made in the report of the special agent and affecting the entry made in his name, and upon which he has made final proof. At such hearings the government should be represented by a special agent of this office, who should be furnished with such information as the report herewith of Special Agent Ankeny, and other papers, may afford. The agent should be instructed to procure the attendance of such witnesses, and to present such evidence as will in each case protect the interests of the government, and guard against the perpetration of fraud.

It appears that under authority from your office certain filings and

entries have been made on portions of these lands since your office decision of June 8, 1883. The parties who made them should have notice of the proposed hearings, in order that they may appear and present such facts as may be in their possession and pertinent to the inquiry relative to the charge of fraud in connection with any of the desert land entries mentioned.

The privilege of cross-examining witnesses should be accorded all parties appearing and claiming an interest by virtue of any filing or entry allowed them on the lands.

The decisions appealed from are modified accordingly.

PRACTICE—HEARINGS—BURDEN OF PROOF.

HENRY C. PUTNAM.

A hearing ordered on special agent's report, looking toward the cancellation of a final entry, is a proceeding *de novo* in which the *ex parte* testimony contained in said report should not be considered.

As in such hearings the burden of proof is upon the government it should first submit its proof before the defendant is required to present his defense.

The case of George T. Burns cited and followed.

Secretary Lamar to Commissioner Sparks, July 24, 1886.

Henry C. Putnam has filed in the Department his petition asking that a hearing be ordered to investigate the legality of certain timber entries at the Humboldt, California, land office, which entries you ordered to be canceled upon the reports of special agents, and refused a hearing thereon.

From your letter of June 26, 1886, to Mr. Putnam, it appears that most of those entries were canceled upon the reports of special agents; accompanied by the affidavits of the original entryman to the effect that the original entry was made in the interest of other parties, and from considering a large mass of evidence on file in your office, consisting mainly of reports of special agents and affidavits of individuals, showing the illegal operations of Beach, Evans, Marks, and their associates, the parties in whose interest it is alleged these entries were made.

Upon ascertaining the fact of the cancellation of these entries, Mr. Putnam filed an application in your office, alleging that he is a bona fide purchaser for value, without notice of any defect of title, and held title by conveyance three or four removes from the original entryman, and asks that a hearing be ordered before the register and receiver to investigate and determine the truth of these charges, supporting it by his affidavit, in which he alleged that the affidavits of said entrymen, "that they were hired to make said entries in said lands," were false and untrue, and that parties in interest had conspired to procure the

cancellation of said entries to the end that they may again re-enter and sell these lands. He further alleged that if opportunity was afforded he would be able to show that said entries were made in good faith and for the benefit of said entryman, and were not fraudulent as alleged.

By your said letter of June 26 you refused to order a hearing in these cases, because the application rested solely upon the statement of Putnam that the entries were made in good faith, which you say appears to be merely his opinion, in contradiction to the sworn statement of the entrymen themselves and other parties to the fraud, and that he does not furnish the evidence or even statement of facts which he expects to prove to overcome the case made against the entries.

It does not appear that Mr. Putnam was a party to any of the proceedings, or is any way known in the transaction prior to his application filed in your office for a hearing in said case. In this application he for the first time appears as a party in interest, alleging that he is a bona fide purchaser for value and asking that he may be heard to maintain the validity of these entries. The facts set forth in his application show that he is a party in interest, having such a standing in the case as would entitle him to be heard *ex rel.*, to maintain the validity of the entries in question. See *R. M. Sherman et al.* (4 L. D., 644); *John C. Featherspil* (Ib., 570).

The fact that "his statement is not claimed to be based on personal knowledge, but appears to be merely his opinion in contradiction to the sworn statement of the entrymen themselves and other parties to the fraud," is not a sufficient ground to refuse the hearing prayed for. The sworn statement of the entrymen upon which the reports of the special agents were based, are themselves directly contradicted by the sworn statement of these same entrymen made at the time they entered the land. The applicant now asks that he be allowed the opportunity to show that the first statement was true and the latter is false.

Entries of lands to which he claims title, *bona fide* and for value, have been canceled upon an *ex parte* showing. He now asks that he be allowed to show that the testimony upon which you acted was false, and to sustain the validity of the entries. I think the application for a hearing should have been granted.

This case comes before the Department upon a direct application, invoking what he terms the supervisory authority of the Secretary to order and direct an investigation of the matters in question. In all cases where the Rules of Practice prescribed by the Department provide a means by which the supervisory power of the Secretary may be invoked, they should be complied with.

When the Commissioner refused a hearing in this case, upon the application filed by Mr. Putnam, it was a final decision, and therefore appealable. Had the appeal been refused, an application for certiorari would have been the proper method of invoking the power of the Sec-

retary to supervise and control the action of the Commissioner. For the reason that the action of Mr. Putnam is irregular, his application should be dismissed, and he should be remitted to his right of appeal; but in view of the fact that by my letter of the 6th instant, I returned to your office all cases pending on appeal in the Department at that date from the action of your office in canceling entries upon the report of special agents, to be disposed of under the amended circular of May 25, 1886, allowing all parties whose entries were held for cancellation upon the report of special agents, sixty days in which to show cause why their entries should be sustained, I shall for that purpose treat this application as an appeal, and order that this case be given the same direction.

As the formula of the amended circular of May 25, 1886, may admit of some doubt as to where the burden of proof rests in cases of this character, and in view of the fact that a large number of similar cases were returned to your office with my letter of the 6th instant without an examination of the record of said cases, I deem it proper to call your attention to the rule of practice which should govern in the hearing of such cases before the register and receiver.

When from the report of a special agent it appears that an entry is fraudulent, or from any other cause its validity should be inquired into, such entry should not be canceled upon the report of the agent or the testimony accompanying it, but should be held for cancellation, and the entryman should be notified of such action and allowed sixty days in which to apply for a hearing to show cause why the entry should be sustained; and if it appears from the report of the special agent that the entry has been transferred, the transferee shall also be notified as well as the original entryman. If at the expiration of such time the claimant fails to apply for a hearing to show cause, the entry should then be canceled by the action of your office. But if in response to such notice, the claimant offers to show cause why the entry should be sustained, a hearing should be ordered, at which the government should offer proof to sustain the allegation that the entry is illegal or fraudulent before the entryman shall be required to present his defense. Such hearing is a proceeding *de novo*, at which the register and receiver should not consider the *ex parte* testimony contained in the agent's report, but in all such cases where the entry has been regularly made and final certificate issued, the burden of proof is on the government, and it will be required to establish the truth of the charge at the time of the hearing by the examination of the special agent or such other witnesses as may be produced, so that the entryman may have the opportunity of cross-examination as allowed by law. This rule was clearly announced in the case of George T. Burns (4 L. D., 62), and will be strictly adhered to. See also James Copeland (*Ib.*, 275).

APPLICATION FOR MINERAL PATENT.

JOHN KINKAID.

The preliminary showing required upon application must embrace an amount of work, or expenditure, sufficient to make the claim valid and subsisting at the date of application.

Secretary Lamar to Commissioner Sparks, July 31, 1886.

I am in receipt of your letter of the 26th ultimo, inclosing a letter addressed to you by John Kinkaid, Esq., of Gunnison, Colorado,—herewith returned—and inquiring as to the proper construction of paragraph 3, Circular N, December 15, 1885 (4 L. D., 374), which is an extract from departmental decision in the case of the Good Return Mining Co. (4 L. D., 221), and which reads as follows:

That “compliance ‘with the terms of this chapter,’ as a condition for the making of application for patent according to section 2325, requires the preliminary showing of work or expenditure upon each location, sufficient to the maintenance of possession under section 2324, either by showing the full amount for the pending year, or if there has been failure it should be shown that work has been resumed so as to prevent re-location by adverse parties after abandonment.”

Your inquiry concerns the words “the full amount of work for the pending year,” and your letter construes them as meaning “an amount sufficient to make the claim a valid and subsisting one at the date of the filing of the application for patent.” Said construction is correct. The exact meaning of the paragraph will perhaps more fully appear from a slight transposition of its words, as follows:

3. That compliance ‘with the terms of this chapter,’ as a condition for the making of application for patent according to section 2325, requires the preliminary showing of work or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year; or, if there has been failure, it should be shown that work has been resumed so as to prevent re-location by adverse parties after abandonment.

“The pending year” means the calendar year in which application is made. And you will observe that the paragraph has no reference to a showing of work at date of the final entry.

OFFERED LANDS—PRIVATE ENTRY.

JOHN C. TURPEN.

Tracts withheld from public sale through erroneous markings on the plats or records, or by orders of the General Land Office, are not subject to private entry except after public notice of restoration.

Acting Secretary Muldrow to Commissioner Sparks, July 31, 1886.

I have considered the appeal of John C. Turpen, Esq., from the decision of your office, dated March 26, 1886, rejecting his application to

purchase at private cash entry the following described tracts of land in the old Piqua land district, Ohio:

* * * * *

Your office rejected said application, for the reason that some of the tracts applied for have already been patented by the government, and for the additional reason that the tracts embraced in said application not disposed of are not subject to private cash entry, but they may be entered under the homestead and pre-emption laws, if the applicant furnishes an affidavit duly corroborated, showing that the land applied for is not occupied by any person or persons, with valuable improvements, claiming color of title thereto.

The appellant, by his counsel, has assigned ten specifications of error, which may be considered under three heads:

1st. The decision appealed from is contrary to law.

2d. The decision is contrary to every regulation and precedent of this Department.

3d. "Said decision is erroneous, because no reason or ground for the rejection of said application to purchase is stated therein, and it is therefore arbitrary and unwarranted."

It appears that on March 25, 1886, your office advised the Hon. Charles M. Anderson, in response to his personal inquiry regarding the status of said lands, that any isolated tracts found to be still vacant in Ohio are regarded as having been withheld from disposal, from erroneous marks on the plats and records, or from other causes, and therefore are not subject to disposal at ordinary private entry.

Tracts so withheld must first be restored to market by public notice, before they can be resold at private entry, according to rule laid down in the 9th section of Circular of January 1, 1836, which has been uniformly followed since, and which was held to have the force of law in Attorney General Butler's opinion of July 14, 1837.

I have caused an inspection of the records of your office to be made, and they disclose the fact that all of the tracts applied for are within the enclosure marked with a pencil, and upon which is written "St. Mary's Reservoir for Canal from Dayton to the Miami of Lake Erie." On January 1, 1836, your office issued to the registers and receivers of the United States Land Offices a circular, the 9th section of which contains the following language:

"Whenever you have reason to believe that any tract or tracts in your district, heretofore offered at public sale, may have been improperly withheld from private entry, in consequence of errors in your books, or in marking the sales upon your maps, or from any other cause whatever, you will seek information from this office in relation to such cases; and if it should then appear that the lands have been thus erroneously withheld from private entry, you are particularly required to give notice of the fact by public advertisement in the most convenient newspaper, and to be put up in suitable places, setting forth that at a particular hour and day, therein to be mentioned, you will be prepared to receive applications to enter the lands designated in such notice. This notice

should be given at least *thirty days* before entries are to be received; and in no event will you allow any such lands to be entered or located before the expiration of the time thus prescribed."

The proper construction of said 9th section was considered by Attorney General Butler, on July 14, 1837. The Attorney General held, (3d Opin., 274,) that while no power to make said regulation was expressly given to the Commissioner of the General Land Office by any act of Congress, yet said regulation was warranted by the nature of the case, and the general powers of the Executive under the Constitution; that it is the duty of the Commissioner of the General Land Office, under the general supervision of the Secretary of the Treasury, and through him of the President, to take care that the law is faithfully executed; that one of the most important points to be observed in the execution of the law, is the securing to all persons a fair and equal opportunity to become purchasers of the public lands; and that where lands subject by law to private entry have been improperly withheld therefrom, if a considerable time has elapsed since the close of the sale, to allow them to be entered by any particular individual without a public notice that they are subject to private entry would in most cases give such individual a preference over the rest of the community, and not be a faithful execution of the law.

This opinion was reaffirmed by Attorney General Butler on July 21, 1837, in which he expressly ruled that citizens can not acquire a right to enter lands which have been improperly withheld from private entry, after the close of a public sale, at which they were offered until after notice of restoration. The opinion of Attorney General Butler was cited with approval by Attorney General Crittenden (3 Opin., 653). The same principle is announced in the decision of the Supreme Court of the United States in the case of *Eldred v. Sexton* (19 Wall., 195) wherein it is stated, speaking of offering lands at public sale before allowing the lands to be subject to private entry: "It is to secure to all persons a fair and equal opportunity of purchasing them and to obtain for the government the benefit of competition, in case the lands should be worth more than the price fixed by Congress."

It has uniformly been held that where lands have been covered by entries which have subsequently been canceled, they are not subject to private entry until notice of restoration has been given. See Secretary Chandler's decision in the case of *Jefferson Newcomb* (2 C. L. O., 162), and also Secretary Schurz's decision in the case of *S. N. Putnam* (2 C. L. L., 305).

But aside from the effect of the marking above referred to, the records of your office also show that on January 10, 1865, the register and receiver at Chillicothe, in said State, were advised that "in the progress of business and many changes of incumbents, it has undoubtedly often happened that numerous tracts were applied for, marked as disposed of, and under this impression have been kept out of the market,

and consequently from free competition I have reached the conclusion that a just administration of the land affairs requires us to make a critical and thorough examination whereby to seek out and place in list form every tract undisposed of in this district, and *thereafter* to have due publicity of the *same*, say for sixty days, not only at Chilocothé but at the capital of the State. To this end you will without delay prepare such a list, test its correctness by the most thorough examination, and append your statement thereto that it contains all the lands undisposed of in your district. In the meantime and until further orders you will *permit no entry to be made of any tract*, and will give notice accordingly. This is not to operate as an interdict to any bona fide pre-emption or homestead settlement."

The lands applied for are within the above named district after the consolidation of the other districts with it in said State, and hence come within the operation of the order. It thus appears that, not only on account of the marking upon the township plat, but also by the express order of your office, the lands applied for are not subject to private cash entry. It follows, therefore, that the decision of your office is not contrary to law; that it is not contrary to, but is in accordance with the regulations and precedents of this Department, and that it is not "arbitrary and unwarranted," because it is in accordance with law and the practice of this Department, and gives the correct reason for rejecting said application, to wit: that the lands applied for are not subject to private entry.

The decision appealed from is accordingly affirmed.

MINERAL PATENT—SUIT TO VACATE.

THE MOUNTAIN MAID.

Suit to set aside a patent will be instituted by the government where it, though without interest, is under obligation to protect the title of third parties, who have no remedy except through such intervention.

Acting Secretary Muldrow to the Attorney General, August 3, 1886.

In view of your communication of the 2d ultimo, relative to the petition of James Reilly for the institution of a suit in the name of the United States to set aside a patent issued on August 15, 1882, to For-dyce Roper for the Mountain Maid Mining claim, upon Tucson, Arizona, Mineral Entry No. 118, I have reconsidered my opinion of April 16 last, heretofore forwarded to you, recommending that such suit should not be brought. When said opinion was written, it was my impression that the location recorded November 10, 1880, and subsequently to the issue of the townsite patent, was the initiation of Roper's right to said claim. I am now advised that the facts are otherwise, and

that his right relates back to the original location of February 25, 1879, thus antedating the townsite claim, and I therefore recede from my said recommendation.

Mr. Reilly's petition is founded chiefly upon the allegation that the land embraced in the Mountain Maid claim is not valuable for minerals, that its non-mineral character was well known to Roper at date of his application for patent, and that the patent was issued through fraud on his part and mistake on the part of the officers of the government. I think that a prima-facie case of fraud as stated is made out in the affidavits accompanying the petition; and, as to the alleged mistake, the records of the Land Department show that patent was prematurely issued while there was pending a protest against it by one J. S. Clark, claiming ownership and occupancy of the surface of the claim, and declaring that the land was valueless for minerals. Both the law and the regulations contemplated that full inquiry into the allegations of the protest should be made before issue of patent.

Mr. Reilly asks the intervention of the United States in bringing suit, on the ground that he is an occupant of the land under the patent issued September 22, 1880, to the townsite of Tombstone. The mining claim is wholly within said townsite, and, although the townsite patent antedates the mineral patent, he affirms that the courts will not permit the said fraud or mistake to be shown in collateral proceedings, since they hold that the issue of the mineral patent is conclusive of all the facts upon the existence of which such issue lawfully depends. In my letter to you of the 5th ultimo, relative to the Smoke House Lode (4 L. D., 555), I stated that such are the existing judicial rulings; and it follows that the only recourse of the townsite occupants, in such cases, is an appeal for the intervention of the United States in their behalf, in a direct suit to set aside the patent.

The lands in question are covered by the townsite patent if in fact they are not mineral, and hence the United States are without the pecuniary interest in the result of such a suit, which was adverted to as an important factor in *Mullan v. United States* (118 U. S., 271), and in *United States v. Minor* (114 U. S., 233). It would seem that, under these circumstances, suit should not be brought to vacate a patent for the benefit of third persons, unless the United States are under obligation to protect their title (*Smoke House Lode, supra*). In this case, I think, such an obligation rests on the government in respect of the titles of the lot occupants under the townsite patent, heretofore represented by the protestant Clark and now by the petitioner Reilly. There was no neglect on their part to advise the Land Department of the non-mineral character of this tract while the mineral application was pending; the Department was under obligation to inquire into this allegation before issuing patent, and had it done so presumably patent would not have issued; and it is now under obligation to ask the judiciary to set aside the patent, which in fact did issue by reason of its own neg-

lect to make the inquiry. I therefore recommend that the suit prayed for by Mr. Reilly be instituted—if in your judgment, on further consideration, it is deemed advisable.

PRIVATE ENTRY—FORMAL LIMITATION.

JOHN E. JORDAN.

A private cash entry, upon one certificate, will not be allowed for more land than can be described by sub-divisions in the ordinary form of cash certificate and patent.

Acting Secretary Muldrow to Commissioner Sparks, August 5, 1886.

I have considered the case arising upon the appeal of John E. Jordan from your office decisions of February 10, March 18, and May 25, 1885, affirming the action of the local officers in refusing to allow him to make private cash entry, upon one certificate, of numerous scattered tracts of land, in townships 30 N., ranges 3, 4, and 5 W., Olympia, Washington Territory, amounting in the aggregate to about 11,590 acres.

The local officers assign the following as their reason for rejecting said application:

We refused to consider the same until it was presented in conformity to the requirements of your circular "C" of September 17, 1883, in which you say:

"You will take care that no more land shall be included in a private cash entry than can be described by sub-divisions in the ordinary form of cash certificate and patent. The sub-divisions should be confined to one section whenever practicable, to lessen the chances for confusion and error in posting."

Said cash application did not meet these requirements, in that it embraced tracts not only in different sections but in different townships and ranges. Furthermore, a portion of the land embraced in said application is not subject to private entry.

Upon your office affirming the action of the local officers, Jordan appeals to the Department, upon the ground that the limitation contained in said circular of your office (September 17, 1883,) is clearly in conflict with Sec. 2354 of the Revised Statutes, which provides that—

All public lands, when offered at private sale, may be purchased, at the option of the purchaser, in entire sections, half-sections, quarter-sections, half-quarter sections, or quarter-quarter sections.

I can not see that there is any conflict between the regulation of your said office circular above quoted and the Revised Statutes, and therefore affirm the decision appealed from.

SWAMP LANDS—EFFECT OF CERTIFICATION—CONTESTS.

STATE OF OREGON.

Contests calling in question the character of lands certified to the State will not be allowed, except where it is duly shown that the certification was the result of fraud or mistake such as would warrant the vacation of a patent based thereon, or where priority of right is claimed.

The scheme of adjustment lies within the discretion of the Secretary of the Interior, and he may vary the same, if he deems best, where the status of the lands is yet undetermined.

There is no statutory authority for contests against swamp selections, but the Secretary, prior to certification, may allow the same in aid of the duty devolving upon him in the adjustment of the grant.

Secretary Lamar to Commissioner Sparks, August 7, 1886.

On October 10, 1885, the Hon. Z. F. Moody, governor of the State of Oregon, filed in the Department a petition, requesting that all hearings before the register and receiver to determine the character of any lands heretofore selected by the State of Oregon as swamp and overflowed lands be discontinued, and that all cases now before the register and receiver be suspended until further instructed by your office.

This application covers two classes of lands: (1) Those in which the character of the land has been determined by a joint commission of special agents appointed on the part of the United States and the State of Oregon respectively, and whose examination and report has been passed upon by the Department; and (2) Those lands selected by the State of Oregon as swamp lands, the character of which has not yet been determined.

It is claimed by Governor Moody, that the Department and the State having agreed upon a special agency or means to be employed in determining the character of such lands, the Department is now estopped from employing any other agency for determining the character of said land.

On June 30, 1880, the Commissioner of the General Land Office appointed R. V. Ankeny special agent on the part of the United States to make an examination in the field of all lands claimed by the State as swamp land, the character of which had not prior thereto been determined by the Department. He was directed to cooperate with an agent to be appointed by the State, to agree upon a plan of operation and to obtain information as to the character of the land by examination in the field, and taking of testimony, and to transmit a list of the tracts, accompanied with a record of the testimony touching the character of the land.

On September 25, 1882, the Commissioner of the General Land Office advised the local officers at Lakeview, Oregon, that by a recent examination of land in their district, claimed by the State as swamp land, said agents acting conjointly reported certain tracts of land (designating

them) as not being either swamp or overflowed, and the claim of the State to said lands was rejected. Thereafter, on the 28th of September, 1882, he made similar decision upon the report of said agents, rejecting other tracts for the same reason. The amount of land thus rejected was about 48,000 acres.

From these decisions the State appealed, alleging as error, that the lands were so reported by said agents without taking testimony as to their character, as provided for by the original agreement, and that said decisions were based solely upon the report of said agents, supported by their joint affidavit. On January 24, 1885,* the Secretary of the Interior decided adversely to the State and refused to allow a re-examination of said lands.

By reference to this decision it will be seen that, under the instructions to Ankeny of June 30, 1880, he was directed, besides making a personal examination in the field, to take testimony as to the character of the land, and to transmit to your office a list of such tracts as the two agreed upon, accompanied by testimony as to the character of each tract, and in case of disagreement to report his own opinion accompanied by like testimony.

On September 1, 1880, Ankeny was instructed that the taking of testimony would require more labor, time and expense than was contemplated when his instructions were issued, and that they (the agents) should jointly examine the lands claimed by the State; make out a list of such as were found to be swampy, and attach their affidavits thereto setting forth such facts.

This modification of the original instructions was accepted by the State, and acting under them said agents reported to your office a large number of tracts, some as swamp and inuring to the State, and others as dry and not subject to the claim of the State under its grant. It was upon this report that the Commissioner of the General Land Office rejected the claim of the State to such lands as were reported not swamp and overflowed, which was affirmed by the Secretary of the Interior on appeal, holding that the State having acted under the modified plan, that it was competent for your office to adjudicate the character of the land upon the report of the agent, made in pursuance thereof, and that the State is estopped from re-opening the case, and of submitting testimony touching the character of the land, as provided for by the original agreement.

To this decision the State of Oregon filed a motion for review, which, on March 3, 1885, was refused and the former decision affirmed. Afterwards a second motion for reconsideration of said decision was filed by the State, and on June 19, 1885, Acting Secretary Muldrow, holding that "the final decision of the head of a department is binding on his successor," refused to disturb it.

At the same time that the said agents reported the 48000 acres of land

*3 L. D., 334 and 440.

as not swamp and overflowed, they also reported a large tract of land as swamp and overflowed which was so certified by the Commissioner as inuring to the State under the swamp land grant, which was approved for patent by the Secretary of the Interior September 16, 1882. These lands are reported in what is known as list No. 5. On some of these lands it is alleged that parties have settled and purchased or have contracted to purchase them from the State. It is also alleged that contests have been filed by certain parties, denying that the lands so reported are in fact swamp lands, and asserting that they are public lands of the United States, which its citizens have a right to enter. Upon the filing of such contests, you ordered hearings before the register and receiver to determine this question, and this is one of the classes of lands referred to in the letter of Governor Moody, in which he requests that all hearings before the register and receiver to determine the character of such lands may be discontinued.

The question as to the character of these lands has been fully adjudicated upon the report of the special commission appointed for that purpose. As to the lands reported as not swamp and overflowed, it has been decided by the Department that the State is estopped from further examination of said lands and can not now be heard to show that such lands are swamp and overflowed; and that the government and all other parties are equally estopped from investigation of the character of the lands reported by said commission as swamp and overflowed, and which have been approved and certified as lands inuring to the State under the swamp land grant, unless fraud or mistake be shown.

In passing upon this question, Secretary Thompson, in 1857, said:

"The approval and certification of my predecessor are the completion of a duty in regard to swamp and overflowed lands, imposed on the Secretary of the Interior by said act of September 28, 1850, and his act cannot now be properly reviewed or recalled. The State authorities have a right to call for a patent or patents to certified lists, unless fraud or mistake has been discovered." 1 Lester, 557.

Again the same Secretary held:

"When a tract has been selected, and has been approved and certified as a swamp tract * * * the fact of the land being of a swampy description must be regarded by us as affirmatively determined, and not to be drawn in question or subject to a different adjudication."

This has been the uniform ruling of the Department. Therefore an application for contest, which merely alleges that lands certified and approved by the Secretary of the Interior as swamp and overflowed are not such in fact, but dry and fit for cultivation without artificial drainage, should not be received, and no hearing should be ordered thereon, although the land in fact may be of the character described in the affidavit; because the approval and certification of the list by the Secretary of the Interior affirmatively determined that fact, and that judgment can not be drawn in question or subject to a different

adjudication by merely showing that the Secretary committed an error in his finding.

Such approval and certification, however, will not conclude the government, if it be shown that it was obtained by fraud or mistake. If after such approval and certification of the list it is discovered that lands have been reported as swamp and overflowed, which in fact were not of that character, and that such lands were so reported through the false and fraudulent acts and misrepresentations of either the government agent or others charged with the investigation of the character of such lands, and upon whose decision and report the approval and certification was obtained, such approval and certification may upon proof of such facts be reviewed and recalled. "Fraud vitiates the most important judicial acts when found to exist in them, and renders them void upon discovery before the proper tribunal." *De Louis v. Meek*, 50 Am. Dec., 512, and notes to decision.

So in like manner a final decision of the Secretary may be reviewed and revoked, upon the ground of mistake: not mere error of judgment, but that character of mistake which would afford a ground of relief in a court of equity. The courts have no jurisdiction over public lands until after the issuance of patent. Hence, before the issuance of patent, the Department of the Interior is the only tribunal having jurisdiction to review the decision of a former Secretary, or to revoke or recall its own decision, when obtained by fraud or mistake. But the ground upon which such decision may be reviewed and revoked is the same that would be required in a court to set aside a patent obtained by fraud or mistake.

You will therefore dismiss all applications for contest, and hearings ordered thereon to determine the character of the lands heretofore approved and certified to the State as swamp and overflowed—unless in such applications it is charged that the decision was procured by fraud or mistake, or the contestant amends his affidavit within thirty days after notice alleging that said decision was procured by fraud or mistake, setting forth specifically the facts upon which such allegation is based. However, if the contestant alleges priority of right under any of the public land laws of the United States, acquired prior to approval of and certification of the list, he may then be allowed to contest without alleging fraud in the procurement of said decision, he not being concluded by the decision to which he was not a party.

This disposes of all lands that have been heretofore examined, and reported by the special agents, and passed upon by the land office.

After the decision of June 19, 1885, Charles Shackelford was, by letter from your office of August 11, 1885, assigned to the duty of examining in the field other lands claimed by the State of Oregon under the swamp grant, which have not been reported. This appointment, it is presumed, was made for the purpose of continuing the investigation commenced by Special Agent Ankeny. He was instructed specifically

as to the character of the land that passed by the grant, and was advised that in order to facilitate the adjustment of the State's claim, that it had been agreed by the authorities of the State of Oregon and the Secretary of the Interior that lands claimed by the State shall be examined in the field by the agents of the respective parties. A list of the lands to be examined was furnished him, and he was instructed to make a careful examination of each tract, and to secure evidence touching the character of the same in 1860 and prior thereto. He was further required to make out a list of the tracts upon which himself and the State's agent agreed, separating the swamp lands from those found to be dry; to attach their joint affidavit touching the character of the land, to each list, and to forward the same to your office, with his report and book of notes in the field. Since the issuing of these instructions, contests have been filed by various parties, alleging that certain tracts selected by the State as swamp land are not of the character contemplated by the act, and hearings have been ordered before the register and receiver to determine the character of said lands.

By letter of November 7, 1885, to this Department, you call attention to the fact that such hearings are ordered upon allegations filed under oath that the lands are not of the character granted, and are not swamp lands in fact, but public lands of the United States, which citizens have a right to enter under the public land laws. You treat these applications of contest as an absolute right, under the Rules of Practice, in any person to contest any claim, and that the rules make no exception in favor of swamp claims.

The act makes no provision for the contest of the right of the State to lands selected under the swamp land grant, and if contest are allowed by rules and regulations of the Department, it is simply in furtherance and aid of the duty devolving upon the Secretary of the Interior to determine the character of such lands, and not from any absolute right given by law.

It is the duty of the Secretary of the Interior to determine what lands are of the description granted by the act, and his office is made the tribunal whose decision on that subject is to control. While the Department has adopted general methods for designating such lands, the Secretary is not restricted to any plan, but may adopt and employ such agencies as may in his judgment satisfactorily determine what lands are of the character granted by the act. It is immaterial what means are employed, the essential object being the ascertainment of the character of the land. Therefore I do not concur in the view advanced by Governor Moody, that the Department having adopted one plan is estopped from employing any other agency to determine the character of lands which have not been ascertained by such adopted plan. While this plan may still be enforced, the Department is not estopped from permitting contests in conjunction with it, if, in the opinion of the Secre-

tary, the true character of the land may by such contest be best determined.

The plan adopted by the Department and agreed to by the State seems to be a safe and practical plan of adjusting the grant to this State and of determining the true character of the land selected. Under the instructions to the special agent, he is empowered to take testimony as to the character of each particular tract and to make to your office a full report of such testimony. In this respect his investigation may be as full and complete as may be had in a hearing before the register and receiver, besides having the advantage of a personal examination in the field.

While under this plan the great mass of land claimed by the State may be safely adjusted, I can not pass by with indifference the charges openly made that a large amount of lands claimed as swamp in this State have been procured by affidavits of irresponsible persons, and that much of it is more of the character of desert than swamp, and that bona fide settlers have been thereby prevented from obtaining legal subdivisions of lands, the greater part of which is fit for cultivation without artificial drainage.

I do not know whether these charges are true or false, but being brought to my attention, a judicious administration of this subject would require that every means should be adopted whereby the truth may be obtained and the true character of these lands determined. If the lands were swamp at the date of the grant, the State is entitled to them, and her right to them should be determined as speedily as possible. If they are not swamp, the settler should not be deprived of his right to enter them. The truth can harm no one, although the inconvenience or discomfiture of parties may be involved in arriving at it.

I therefore direct that you will instruct the special agent of the government to proceed as early as practicable to make a careful and complete investigation of such lands, strictly observing the instructions contained in your letter of August 11, 1885, and make report of the same to your office, with a view to have such lands as are by them reported swamp and overflowed approved and certified for patent; but if before such approval and certification any person files a contest under existing regulations of the Department, you will order a hearing to determine the character of any legal subdivision upon which such contest is filed.

SWAMP LAND—EFFECT OF CERTIFICATION.

STATE OF CALIFORNIA *v.* FLEMING ET AL.

After due investigation and adjudication under the fifth clause of section 2488, R. S., the lands were certified to the State, and the character of the same may not now be called in question on the mere allegation that they were in fact not of the character granted.

Secretary Lamar to Commissioner Sparks, August 7, 1886.

I have considered the appeal of the State of California from your decision of November 19, 1885, modifying the decision of the register and receiver at Stockton, California, rejecting the application of the following parties to make pre-emption and homestead filings for certain tracts of land in Township 3 N., Range 7 E., Stockton, California, viz: Julius A. Fleming, pre-emption, SE. $\frac{1}{4}$ sec. 23.

* * * * *

The register and receiver rejected these applications, upon the ground that the lands applied for had been listed to the State of California as swamp lands, from which decision applicants filed separate appeals, alleging that said lands had not been surveyed, segregated and listed by the surveyor-general as swamp lands, and that the lands were within an asserted Mexican grant.

You modified this decision, holding that, although the land had been approved and certified to the State by the Secretary of the Interior, yet as patent had not been issued to the State under its grant, that the party applying to enter should have been advised of his right of contest, and his application to enter should be suspended and placed on file to await such action as may be taken to test the right of the State to said land, under the swamp land grant.

From this decision the State of California, in behalf of her grantees, to wit, J. H. Cole, Heath & Boody, C. H. Wakefield, C. A. Merrill, John Bunch, G. I. Leffler, B. F. Pope, J. J. Pope, appealed.

These lands are embraced in list No. 1, which was approved and certified to the governor of the State of California, December 12, 1866, and with other selections were the subject of investigation by the United States surveyor general for the State of California, upon whose report the Commissioner of the General Land Office, by letter of February 11, 1871, decided that said lands having been fully disposed of were no longer within the control of the General Land Office. Then, naming the lands now in controversy, he says: "The records of this office show that (these lands) have been approved as swamp lands, but suspended on account of the supposed interference of a private grant since declared invalid. They will therefore be carried into patent as swamp lands."

This ruling was concurred in by the Secretary of the Interior, October 16, 1872, and the decision of the Commissioner, deciding that patent

should issue for said lands, was affirmed, thereby removing from the Department all further control over the lands in controversy, unless said decision was procured by fraud or mistake.

The lands in controversy were returned by the surveyor general as "lands subject to periodical overflow," and hence were not subject to certification to the State by virtue of the return of the surveyor general. The State of California claimed said lands as swamp and overflowed, and under the fifth clause of section 2488 of the Revised Statutes, a full and complete investigation of the character of these lands was made by the surveyor general, who reported, while scarcely any of them could be classed strictly as swamp lands, yet their condition at that date was the result of artificial improvements, and in regard to the practical cultivation of staple crops the preponderance of testimony showed that no proper guarantee of security against floods could be had in a majority of seasons without artificial improvement, and consequently no hope of profitable cultivation in the long run. For this reason he determined that the claim of the State was valid and should be allowed.

As the character of these lands was directly put in issue in the investigation before the surveyor general, and upon his finding they having been approved and certified to the State, these applicants should not now be allowed to raise the same question—especially after a lapse of twenty years, when it may be safely presumed that the present occupants have now fully reclaimed said land.

The decision of your office is reversed.

RIGHT OF PURCHASE UNDER THE ACT OF JUNE 3, 1878.

HEIRS OF WILLIAM FRIEND.

The right to receive title under this act accrues when the proper proof is furnished and the money paid.

Where an applicant had made proof and tendered the purchase money, but died prior to the allowance of his entry, it is held that his heirs may complete the purchase.

Secretary Lamar to Commissioner Sparks, August 7, 1886.

December 16, 1882, William Friend made application, under the act of June 3, 1878 (20 Stat., 89), to purchase Lots 6 and 7, and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 6, T. 2 N., R. 2 E., Humboldt, California. He published the usual notices, furnished all the proofs required by the statute, and tendered the purchase money for the land applied for; but was refused because of the adverse claim of one Jacob Showers, Jr.

By decision of this Department, dated November 24, 1884, (3 L. D., 210), the claim of Showers was rejected as invalid, and the land was awarded to Friend. Prior to said decision, however, to wit: April 14, 1884, Friend died. March 6, 1885, his heirs made payment for the land (\$417.23) and the entry was allowed by the local office in their name.

Your office, however, by decision of May 27, 1885, held said entry for cancellation, on the ground that—

“The right to purchase under the act of June 3, 1878, is confined to the party who makes the sworn statement. Such right can not survive the death of the claimant.”

The case is now here on appeal from said decision of your office. Under the timber land act the right of the applicant to a patent becomes complete and vested when he shall have furnished the proofs required in the manner pointed out by the act, and shall have paid the purchase money. Under the general law—

“The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.” *Stark v. Starrs* (6 Wall., 402).

And further—

“The rule is well settled by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.” *Wirth v. Branson* (98 U. S., 118.)

Now, in the case under consideration, the money was not *actually* paid and the entry was not *actually* made prior to the death of the original claimant. But he had done all that he was required to do under the law. He had tendered his money, and the only reason why it was not received and his entry then allowed was because of the invalid adverse claim of Showers. As before stated, my immediate predecessor rejected this claim of Showers for invalidity, and directed that Friend's application should stand. In other words, his right was held to have attached at the date of his said application. This right, as above shown, was a right to a patent if the money had been paid. That it was tendered is, so far as the applicant's rights are concerned, equivalent to the actual payment of the same. His right was, therefore, not merely a *personal* right, but was, in every sense of the word, inheritable *property*.

I therefore reverse the decision appealed from.

PRACTICE—WITHDRAWAL OF CONTESTANT.

TAYLOR v. HUFFMAN.

Though the contestant may withdraw from a case pending on appeal before the Department, such withdrawal will not prevent action on the evidence submitted.

Secretary Lamar to Commissioner Sparks, August 7, 1886.

In the case of Thomas Taylor v. Thomas M. Huffman, involving the latter's timber-culture entry No. 2203, of the SE. $\frac{1}{4}$ of Sec. 24, T. 23 S., R. 33 W., Garden City, Kansas, an appeal has been filed by Huffman from your adverse decision of June 20, 1885.

The record shows said entry to have been made August 12, 1878; and contest to have been initiated against the same February 7 (not February 4), 1884, on the general charge of failure to comply with the law, no trees growing, and abandonment. The trial was had March 25, and the decision of the local office in favor of the contestant is dated May 20, 1884. You held the entry for cancellation on the ground that the evidence showed no planting of any seeds, nuts or cuttings, save Osage Orange, you considering that not *timber* within the meaning of the law.

It is shown by the evidence that in 1880 there was some breaking done upon the claim; that in 1881 five acres were cultivated to rice corn, and five acres were planted in box elder and maple seeds, which failed to grow; that in August 1882 about ten acres were planted in Osage Orange seeds, this planting being done in a most unsatisfactory manner, by opening a furrow with a plow, and then sticking the seeds in the side of the bank with the fingers, and as a matter of course nothing ever came of such work; and that in April and May, 1883, the same ten acres or thereabouts were planted in Osage Orange plants, three feet eight inches by four feet apart. It also appears that these, too, failed to grow. So that at date of contest, about five and a half years after entry, the tract was practically in the same condition as when entered. In other words, the contestant has made out his case, unless it be shown satisfactorily that the evident failure to comply with the law was no fault of the entryman. What is his showing in this respect? Simply that there was some planting done for three years, and some little stirring of the ground every year since the date of entry. This is not sufficient of itself. He should have shown that this breaking and cultivating was done in a proper manner at the proper season of the year, and that the planting was also done in that manner. This is not shown, but rather the contrary. In fact the whole case bears evidence of trifling with the law, and of attempting to secure a tree claim with a very unsatisfactory showing. See *Caviness v. Harrah* (4 L. D., 174).

For these reasons I am of opinion the entry should be canceled, and to that extent I affirm your decision.

Since your decision was rendered, there has been filed with the papers in the case the formal withdrawal of his contest by the contestant Taylor. This Department sees no objection to his withdrawing from

the case if he so elect, and his withdrawal is therefore accepted. But in all cases of this kind the government is a party in interest and will endeavor to see that the law is not trifled with. The withdrawal of his contest will not, therefore, prevent the government from making use of the evidence furnished by him against this entry.

PRACTICE—NOTICE AFTER CONTINUANCE.

COREY v. HUNT.

Through continuances granted on the application of both parties the hearing did not occur until sixty days after service of notice had been perfected, and such notice was accordingly held sufficient.

Acting Secretary Muldrow to Commissioner Sparks, August 7, 1886.

I have considered the case of James Corey v. Walter D. Hunt, on appeal by the latter from your office decision of May 9, 1885, holding for cancellation his homestead entry No. 22,145, for the SW. $\frac{1}{4}$ of Sec. 1, T. 103 N., R. 63 W., Mitchell, Dakota.

Claimant alleges error in the action of the local office and your office, insisting that the notice of hearing was insufficient. On careful examination of the record I am convinced that whatever insufficiency may have originally existed in the service of the notice was cured. It appears that plaintiff in his original contest affidavit, dated April 3, 1883, alleged simply "that the present address of said Walter T. Hunt is unknown to this deponent, and that personal service can not be had upon him." On the 14th of June ensuing this affidavit was amended by stating that contestant had "made diligent search for said claimant . . . and diligent inquiry among the neighbors living in the vicinity of the said land, and that he has been unable to learn the whereabouts or residence of said claimant . . . wherefore deponent asks that said case may be continued for the perfection of service." The case was accordingly continued from June 14 to July 25, same year. On the 23d of July, personal service was made upon said claimant. Two days previously, however—to wit, on the 21st of July—the claimant had asked for a continuance of the hearing for sixty days in order to enable him to obtain certain witnesses whose evidence he claimed to be essential; and the case was continued to September 25. Having obtained this continuance, claimant objected to the sufficiency of service, "for the reason that he was a resident of Aurora county, Dakota Territory, and that personal service could have been made upon him; but inasmuch as service of notice was made by publication the contest should be dismissed."

From this it appears that both service by publication and actual personal service had been made upon defendant more than sixty days before the hearing was had. Such notice was sufficient, and I have therefore decided the case upon its merits.

Your office decision is hereby affirmed.

PRE-EMPTION—MARRIED WOMAN.

PORTER v. MAXFIELD.

The right of a deserted wife to make entry rests in the statutory privilege accorded to the "head of a family"; but the fact of desertion must be affirmatively shown before the right of entry accrues.

Secretary Lamar to Commissioner Sparks, August 10, 1886.

I have before me the case of William G. Porter v. Mary A. Maxfield, as presented by the appeal of Porter from the decision of your office rendered January 6, 1885.

This case involves the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and Lots 2, 3 and 4 of Sec. 33, T. 154 N., R. 43 W., Crookston, Minnesota, which was covered by the pre-emption filing of George Maxfield made December 28, 1880, upon which he made final proof and payment, and received certificate therefor November 15, 1881. This entry was canceled by decision of your office August 14, 1883, in an *ex parte* proceeding, wherein it was found that the entryman was not a qualified pre-emptor, he not having filed his declaration of intention to become a citizen; and by the same decision Mary A. Maxfield, wife of George Maxfield, was allowed to file for said land, "It being satisfactorily shown that the claimant since the date of entry had deserted his wife and family, and that the latter have continuously resided upon the tract from date of the original settlement."

Mrs. Maxfield accordingly filed declaratory statement August 27, 1883.

William G. Porter on October 24, 1883, made homestead entry of the tracts involved herein.

February 13, 1884, Mrs. Maxfield gave notice of her intention to make final proof and payment on March 23, 1884, and thereupon Porter appeared and entered protest, alleging in substance that Mrs. Maxfield was not a qualified pre-emptor in that she was not in fact a "deserted wife;" that she had entered into a collusive scheme with her husband, by which to secure title to said land in her name and so defeat a certain conveyance of a portion thereof made by the Maxfields, prior to the cancellation of George Maxfield's entry. On the issue thus joined, hearing was duly had. The local office found in favor of Mrs. Maxfield, and your office affirmed such conclusion, and held Porter's entry for cancellation, whereupon he duly appealed to the Department.

The evidence shows that on November 15, 1881, the day on which George Maxfield received his final certificate, he and his wife executed a mortgage covering said land for the amount of \$325; and that said Maxfield and wife made a warranty deed of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said land September 15, 1882, to John T. Knight and Adam Zeh, the consideration named being \$1500.

Mrs. Maxfield testifies that in March, 1883, her husband deserted her, because she refused to join in further encumbering the unsold portion of the land. It appears, both from her testimony and that of the other witnesses, that from said date of alleged desertion to the time of hearing George Maxfield returned to his home from time to time, and that at said hearing he was in Crookston and a guest of the family where his wife was then staying. As to whether he contributed to the support of the family the proof is somewhat conflicting, there being some evidence to show that he did send provisions to his wife during the period of alleged-desertion, while the wife swears that he in no manner assisted in the care of the family, and that from March 1883 the marital relation between them ceased.

The fact that Mrs. Maxfield was allowed to file for this land by the decision of your office in the *ex parte* proceeding, referred to hereinbefore does not relieve her from the necessity of showing by competent evidence on final proof that she is a qualified pre-emptor. This, I think, she has failed to do, aside from any evidence furnished by the protestant. Being a married woman, she is not allowed under the law to make entry, unless from the facts found it may appear that she is so entitled as the "head of a family." Having set up the plea of desertion, it rests with her to show such fact affirmatively, before the right of entry accrues. On her own showing the most that can be concluded therefrom is that her husband was absent much of the time and was of an idle and improvident character, but that he actually intended to, or did, desert his wife and family is not to be discovered from the evidence.

The decision of your office is therefore reversed. The final proof of Mrs. Maxfield is rejected, her filing will be canceled, and Porter's entry held intact.

PRIVATE CLAIM—ACT OF JULY 23, 1866.

RANCHO LOS PRIETOS Y NAJALAYEGUA.

The eighth section of this act authorizes the survey of a private claim confirmed by act of Congress.

The Department may in a proper case of error shown, extend the boundaries of a private claim though patent has already issued for a lesser area thereunder.

Secretary Lamar to Commissioner Sparks, August 9, 1886.

On September 24, 1884, Susan G. Huse, through her attorneys, Messrs. Britton & Gray, by petition to my predecessor, invoked the supervisory power, with which the Secretary of the Interior is clothed in relation to the affairs of the Land Office, with a view to the correction of grave errors alleged to have been committed in the matter of the location, survey and patenting of the Rancho "Los Prietos y Najalayegua," located in Santa Barbara county, California, and of which

Jose Domingues was confirmee. The application of Mrs. Huse was referred to your office November 11, 1884, for "examination and decision;" and your report of February 24, 1886, in relation to said matter is now before me.

Though the lands in question are in California and claimed under a Mexican grant, by Pio Pico, then governor of that Territory, made to Jose Domingues on September 24, 1845, said grant never was submitted to the Board of Land Commissioners for confirmation as required by the act of March 3, 1851 (19 Stat., 631). But an act of Congress, approved June 12, 1866 (14 Stat., 589), confirmed said grant to Jose Domingues, and directed that the surveyor general of California should survey the granted lands "in accordance with the original title papers on file in his office," and on approval of said survey by the Commissioner of the General Land Office patent should be issued to Domingues or parties holding under him.

Parties claiming the grant title having made deposit for the purpose, on April 25, 1867, a survey was made by Deputy G. H. Thompson, in accordance with the views of claimants. This survey was published under the act of July 1, 1864, (13 Stat., 332,) and embraced an area of 208,742.33 acres, or some forty-seven square leagues. The surveyor general declined to approve it, and forwarded it to the Commissioner of the General Land Office, who likewise disapproving of it directed, July 20, 1870, another survey to be made, at the expense of the claimants, not to exceed in area eleven square leagues. The attorneys of the parties making claim to said property were notified of this action, but failed to deposit money for the ordered survey. On July 21, 1873, the surveyor general was directed by the Commissioner of the General Land Office to proceed under the 8th section of the act of July 23, 1866 (14 Stat., 218) to extend the lines of the public surveys over the premises, laying off a portion in satisfaction of the grant. This was done by Deputy William H. Norway, whose survey, containing an area of 43,583 acres, or about 5,000 acres less than eleven square leagues, was approved by the surveyor general and forwarded to the Commissioner of the General Land Office June 24, 1874.

The correctness and validity of this survey was denied by several parties claiming interest in the lands within limits of said survey; and also by Eugene L. Sullivan, claiming to be owner of the grant title. He was represented before the Commissioner by Messrs. Britton & Gray, and Drummond, who asserted, in his behalf, that the Thompson or first survey was substantially correct. On September 18, 1874, the Commissioner rendered an elaborate decision (1 C. L. O., 116), wherein it was held, among other things, that the grant was restricted to eleven leagues in extent, and should be located, as to its north and south boundaries, between the mountain ranges delineated on the diseño. As to the east and west boundaries there was, practically, no dispute. The Commissioner also held that the Norway survey was unauthorized,

and directed that another be made in accordance with the views expressed. From this decision an appeal was filed, October 8, 1874, by Britton & Gray, and Drummond, for the grant claimants, under instructions from Sullivan, and also an appeal on November 30, 1874, by H. S. Brown, Esq., as attorney for the Santa Inez & Scott Quicksilver Company. The papers were submitted to the Secretary on January 12, 1875, but on the twenty-second of the same month the appellants filed a formal withdrawal of their appeals, and requested a return of the papers to the Commissioner of the General Land Office, which was done.

A paper was then filed with the Commissioner, signed by the attorneys for all the parties appearing before him in the case, submitting a diagram of a tract of about eleven square leagues, within the boundaries fixed by the Commissioner's decision, which said tract it was asked should be surveyed and patented. This was subsequently done, and a patent, conveying a little less than eleven square leagues, was issued on February 19, 1875, to Jose Domingues, and delivered to A. Packard, Esq., as attorney in fact for Eugene L. Sullivan, who claimed to be and was recognized throughout all the proceedings as sole owner of the grant title to the entire tract—Packard making and filing affidavit also to that effect on the date of delivery of patent.

Mrs. Huse now asks that all of said proceedings be reopened and reviewed, alleging that Sullivan was not authorized to act in the premises; that so far from holding the entire grant title, he held but a small interest therein; but that she, Mrs. Huse, was then the owner of the principal interest and has since become the owner of the entire grant title; that she was not a party to and had no notice of or voice in said proceedings; had no notice of the Commissioner's decision of September 18, 1874, and never acquiesced in it; never applied for or authorized any one to apply for patent; has not accepted or recognized, or had control of the one issued, or in any way waived her rights under said grant. She says that she acquiesced in the Thompson survey of which published notice was given, but insists she had no notice of the subsequent proceedings by which the area of the grant was so largely curtailed. Finally, she claims there was error in the decision of the Commissioner in restricting the area of the grant to eleven square leagues; and asks that the whole record in said case be examined; and said decision reviewed and revoked at her instance; that the Thompson survey, or one in accordance therewith, be approved, and patent issued thereon.

This grant was confirmed June 12, 1866; thrice surveyed, once in 1867, again in 1873, then after contest before the Commissioner in 1874, and patent issued in 1875. A strong case, based upon clear, legal and equitable considerations should be presented to justify the interference of this Department ten years after the case had been closed, for the purpose of enlarging the patented limits, so as to include lands over which the public surveys have long since been extended, and to much of which it is to be presumed other rights have attached.

To meet the complications, which might result from this condition of things, the present application of Mrs. Huse, to re-open the case, is accompanied by an offer on her part to relinquish the grant title to those tracts within the lines of the Thompson survey to which rights may have attached, which but for said grant would be recognized as valid.

I have no doubt that this Department, in a proper case, can grant the relief prayed. *Adams v. Morris*, (103 U. S., 591).

The act by which this grant was confirmed to Domingues directed that survey of the same should be made by the surveyor general of California, "in accordance with the original title papers on file in his office;" which survey when made was subject to the approval of the Commissioner of the General Land Office. Though not specifically so provided in the act, it was unquestionably the duty of the surveyor general to make said survey in accordance with existing laws and rules, so far as the same were applicable. At the date the confirmatory act was approved, the act of July 6, 1864 (13 Stat., 332), was the last enactment in relation to survey of confirmed land grants in California.

The first section of this act provided, in substance, that whenever the surveyor general had made survey of a private land claim, confirmed by the Board of Land Commissioners, he should cause notice by publication to be given; if no objections against said survey were filed, he should approve and forward it to the Commissioner of the General Land Office. If objections were filed they were also to be forwarded. The Commissioner could approve or reject the survey, and order another; if approved patent was to issue. Section 6 provided that such surveys should be made at the request of parties in interest, provided deposit of sufficient sum of money to pay the expenses thereof was made. The other sections need not be referred to here.

Under the provisions of this act, as was before stated, a deposit was made by parties claiming the grant title and the Thompson survey was made, published and duly forwarded to the Commissioner, who declined to approve of it and ordered that another survey be made; to pay the expenses of which the same parties declined to make the necessary deposit when notified of the action of the Commissioner.

Under the act of 1851 to settle private land claims in California it was provided that all lands, to which claim should be made, under a Spanish or Mexican title, within two years, before the Board of Land Commissioners, should be held in reservation, until final adjudication thereon. This "final adjudication" was not reached until survey was approved for patent. Many of the grants were for smaller bodies of land within much larger out-boundaries. The "claim" made before the Board necessarily placed all the land within the out-boundaries in reservation, and claimants thus enjoying the usufruct of vast tracts of land were in no hurry to deprive themselves thereof by seeking to have the true limits of their claims defined by official survey and patent.

To remedy this, as well as other abuses, Congress passed an "Act to

quiet land titles in California," approved July 23, 1866 (14 Stat., 218). Most of the sections relate to grants made to the State for school purposes or of swamp lands; and are foreign to the subject under consideration. But section 8 is legislation independent of other portions of the act, and in my opinion relates plainly to the matter in hand. It provides—

"That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July 1, 1864 it shall be the duty of the surveyor general as soon as practicable after the expiration of ten months from the passage of this act to cause the lines of public surveys to be extended over such land, and he shall set off, in full satisfaction of such grant and according to the lines of public surveys the quantity of land in such final decree, and as nearly as can be done in accordance with such decree, and all land not included in such grant as so set off shall be subject to the general land laws of the United States."

This act went into operation in a little over one month after the confirmation of the Domingues grant.

After the parties claiming title declined to pay the expenses of a second survey, the Commissioner of the General Land Office directed the lines of the public surveys to be extended over the lands in question, setting off sufficient to satisfy the grant, as provided by the act of 1866. This was in 1873 and the survey by Norway was made in June, 1874. From this action an appeal was taken, and such proceedings had therein as resulted in the approval of another survey and the issuing of patent thereon.

It was not until nearly seven years after the confirmation of the grant that this action was taken by the Commissioner; and surely if Mrs. Huse at that time was owner of the whole, or any part, of the grant title she had ample time in which to take the necessary steps to protect her interests. Failing to do so, it was the clear duty of the Commissioner to proceed under the act of 1866. If she did not own the title then, and those under whom she now claims failed to take proper steps to protect their rights, it is too late for her now to be heard on the subject. Either Mrs. Huse or those under whom she claims were, or were not, parties to the proceedings which resulted in the issuing of patent. If parties thereto, unquestionably they must be bound thereby; if not parties thereto, by their own default, they failed to avail themselves of the provisions of the law in their favor, and they are equally bound by the action taken by the Commissioner under the act of 1866—more than ten months after the passage of said act—which was passed for the purpose of meeting just such a case as the one presented by Mrs. Huse—that of a party claiming under a confirmed Mexican grant, who thought proper to slumber on her rights, instead of seeking to have them ascertained and defined.

I have said enough to show why Mrs. Huse's application should not be granted and might end here. But I desire to say that I have examined into the merits of the case, and I am satisfied that said grant was properly restricted by the decision of the Commissioner to eleven square leagues. The confirmatory act refers to the grant as made by Governor Pio Pico and approved by the Departmental Assembly. The governor in his grant expressly states it is made subject to the colonization law of August 18, 1824, and the regulations of November 21, 1828, whereby grants from the Mexican government were limited to eleven square leagues to each individual. The approval of the Departmental Assembly in terms states it to be "in accordance with the law of 18th of August, 1824, and article 5th of the regulations of the 31st of November, 1828."

It is because of these references made in the confirmatory act, clearly pointing to the limitation of the quantity of said grant, in accordance with the Mexican law to eleven leagues, that the facts in this case so plainly distinguished it from that of *Tameling v. U. S. Freehold Company*, (93 U. S., 644,) referred to by counsel. There the grant to Beau-bien was confirmed by Congress as recommended by the surveyor general of New Mexico. On reference to his report he gives the boundaries of the claim as ascertained by the Mexican authorities, who had given juridical possession thereby to the grantees. No mention is made anywhere of the quantity granted and no reference whatever is made to the restraining act of 1824. It was contended that, in view of this act, the confirmation of Congress of the grant was necessarily limited in quantity to eleven square leagues, that being all that the Mexican authorities could grant. But the supreme court said, no; "Congress acted upon the claim as recommended for confirmation by the surveyor general. The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract," the confirmatory act passing title as effectually as though a grant had been made *de novo*. I do not see that if the *Tameling* decision had been made before that of the Commissioner, it could have altered the conclusions arrived at by him.

Counsel seem to think that the court in that case enunciated some new rule; but it did not. It simply declared that the *intention* of Congress, as disclosed by the confirmatory act, was to be carried out as fully as though the grant had been made *de novo*. There the surveyor-general recommended the confirmation of a grant by specific boundaries, without regard to quantity, and Congress so confirmed it. Here the confirmation is for the land granted by Governor Pio Pico and approved by the Departmental Assembly, and the concession of the governor and the approval of the Assembly both refer to the grant as having been made under the Mexican law of 1824, limiting the area of grants to eleven leagues to each individual. So that the intention of Congress is as plainly disclosed and carried out in the one case as the

other and no error was committed in that respect by the Commissioner in the present case.

I therefore decline to grant the application of Mrs. Huse to re-open said case.

INDIAN RESERVATION; RES JUDICATA.

CHARLES W. FILKINS.

Land embraced within the limits of an executive order of reservation, made for a public purpose, but covered at the date of such order by a *prima facie* valid entry, is subject to said reservation on the cancellation of the entry.

The allowance of original entry by the General Land Office will not preclude the Department from determining whether the land was legally subject to such entry when the case comes up for disposition on final proof.

Secretary Lamar to Commissioner Sparks, August 10, 1886.

This controversy relates to the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 10, T. 3 S., R. 1 E., S. B. N., Los Angeles, California; and comes before me on appeal by Charles W. Filkins from your decision of November 3, 1885, holding for cancellation his desert land entry, No. 193, embracing said tracts.

By executive order of August 25, 1877, "all the even numbered sections and all the unsurveyed portions of township 2 south, range 1 east, township 2 south, range 2 east; township 3 south, range 1 east, and township 3 south, range 2 east, San Bernardino meridian, excepting sections 16 and 36, and excepting also all tract or tracts the title to which has passed out of the United States government," were "withdrawn from sale and settlement, and set apart as a reservation for Indian purposes."

Prior to said withdrawal, however, to wit: April 27, 1877, one Ransom B. Moore made desert land entry No. 3, for the land here in controversy and certain other lands, in all four hundred and eighty acres, in said section 10. He made final proof and payment for two hundred and forty acres of his entry April 22, 1880, and patent was issued to him therefor in August, 1883. September 21, 1880, Moore relinquished the remaining two hundred and forty acres of his entry—the same land now in controversy—and his entry as to those tracts was thereupon canceled.

December 9, 1884, Filkins applied at the local office to make desert land entry of the land in question. His application was "rejected on the ground that the tract applied for was reserved for the benefit of the Mission Indians by executive order of August 12, 1877." The local office was in error as to the date of this reservation, and in your decision from which the appeal under consideration was taken the same error is made. The date is August 25, 1877, instead of August 12 of that year. From this rejection Filkins appealed to your office, which, on March 6,

1885, reversed the action of the local office and allowed the said application of Filkins. Thereupon Filkins made entry No. 193, as aforesaid, March 23, 1885, and on the 14th of May following he made the final proof and payment for the land in dispute.

Without passing upon the sufficiency of said final proof your office on November 3, 1885, rendered the decision from which the appeal under consideration was taken, and held the entry for cancellation, on the ground that the tracts embraced therein were reserved for the benefit of the Mission Indians by virtue of said executive withdrawal of August 25, 1877.

The appeal under consideration presents but two real questions for determination, either of which, if decided in favor of appellant, is sufficient to reverse your decision, viz:

"1st. Whether or not the lands in question were reserved and legally appropriated for Indian purposes at the date when Filkins made his entry.

"2d. Whether or not the decision of the former Commissioner of the General Land Office, holding that said lands were not legally appropriated for Indian purposes, and allowing Filkins to enter them under the desert land law, is a final adjudication as to his right to make said entry, and of the legality thereof."

It is insisted by the appellant that the lands involved were never in a state of reservation for Indian purposes; because at the date when the reservation was made they were included in a *prima facie* valid desert land entry, capable of being perfected, in fact, one-half of which afterwards *did* go to patent. In support of this view are cited a number of departmental decisions holding that a *prima facie* valid entry will except lands embraced therein from a subsequent railroad grant, or withdrawal.

It will be observed, however, that there is a manifest difference between the effect of a withdrawal of lands for an Indian reservation and the grant or withdrawal for railroad purposes. The language used is materially different in meaning. Take for example the language used in the withdrawal under consideration. It is "all the even numbered sections . . . (excepting sections 16 and 36) and excepting also all tract or tracts the title to which has passed out of the United States government, be, and the same are hereby, withdrawn from sale and settlement," etc. Very much more will pass under such a withdrawal than under an ordinary railroad grant, in the words following, or in words of similar import, to wit: "That there be and is hereby granted . . . every alternate section of public land, designated by odd numbers . . . not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead may not have attached at the time the line of said road is definitely fixed." The reason of the change in the phraseology and also the change in the construction of the same is very obvious. In the one instance, the government is reserving some of its own lands from disposal, and setting them apart for public pur-

poses, for which real property is required by it. In the other, it is granting to a corporation certain of its lands, and thereby parting with its title to them; and the universal rule governing in a grant of this character is that nothing passes by implication.

Thus looking at the intent and meaning of the withdrawal before mentioned, it becomes apparent that the President therein intended to withdraw for Indian purposes all the even numbered sections in this township (excepting the school sections), the title to which had not passed out of the United States government. It must be conceded that the title to this land in dispute was then in the United States government subject only to the inchoate claim of Moore aforesaid, afterwards abandoned and relinquished. That is to say, the reservation embraced and took effect upon the land in controversy, subject only to said claim of Moore. Subsequently, this claim having been abandoned and relinquished, the reservation thereupon became effective, and by the doctrine of relation was carried back to the date thereof. *Water and Mining Company v. Bugby* (96 U. S., 165). The reservation having become effective, the lands in question were not subject to disposal when Filkins made claim to them, and his entry was improperly allowed.

As to the second question raised by the appeal, it is strongly insisted that said decision of Commissioner McFarland, of date March 6, 1885, being one he was authorized under the law to make, and no appeal being taken therefrom, became final upon every question at issue in the case—that is to say, the question of the right of Filkins to enter the land was *res adjudicata* at the time when the decision herein appealed from was rendered. A great many authorities are cited which are supposed to fortify that position, all of which have been examined and have been given due consideration, but are not believed to be decisive of the question at issue in this case.

It may be conceded as a general rule that the official acts of an executive officer are binding upon his successor in office; and likewise it may be admitted for the sake of further inquiry that the question of the legality of Filkins's entry was *res adjudicata* so far as *your office* was concerned when the decision appealed from was rendered.

But admitting both of these propositions as good law, the whole question can be considered by the Secretary of the Interior at any time it may come before him; and if, after a careful investigation he concludes that an entry is illegal, that it should not have been made, he has a right, and it is his duty, to say so, and direct his cancellation. For in so doing he is not exceeding his jurisdiction, but is "exercising only that just supervision which the law vests in him over all proceedings instituted to require portions of the public lands." *Lee v. Johnson* (116 U. S., 48). See also *Whitnall v. Hastings & Dakota Railway Company* (4 L. D., 249), where this Department set aside a decision of your office, awarding a tract of land to the railway company, which had be-

come final for want of appeal, it being shown that such decision of your office was a clearly erroneous exposition of the law in such cases. To the same effect *Griffin v. Central Pacific R. R. Co.*, decided by me July 15th last (5 L. D., 12).

This land involved not having been patented is still within the jurisdiction of this Department, and it is clearly within the province of the Secretary of the Interior to say what disposition shall be made of it under the law.

Premising this much, and the case being here for my consideration upon all questions involved, I have no hesitancy in arriving at the conclusion that the entry of Filkins should be canceled, and I so direct. To that extent your decision is affirmed.

PRE-EMPTION—FINAL PROOF.

GEORGE W. MACEY ET AL.

Final proof should always receive careful examination and be rejected, though technically complete, if deemed unsatisfactory.

As the ten pre-emption claims herein considered were fraudulently procured to be made in the interest of a lumber company they are accordingly rejected.

Acting Secretary Muldrow to Commissioner Sparks, August 10, 1886.

I have considered the appeal filed in behalf of George W. Macey *et al.*, from your decision of July 25, 1885, adverse to appellants as pre-emption claimants. Your decision and said appeal as filed covered the claims of nineteen persons, who had made pre-emption filings for certain lands in the Duluth land district, Minnesota, you, as well as the register and receiver, finding the cases so similar and so interwoven by the apparent concert of action on the part of claimants as to justify consideration and action in one decision.

As to nine of said cases you refused to recognize the right of appeal, and application was thereupon made for certification under Rules 83 and 84 of Practice. That application is before me and will be acted upon in a decision having special reference thereto.*

There remain therefore ten cases for consideration on appeal. They are as follows:

Claim of George W. Macey, for the SE. $\frac{1}{4}$ of Sec. 2, T. 60 N., R. 23 W.

* * * * *

The filings in all these cases were made March 4, 1884, with allegations of settlement, ranging from March 12, 1883, to January 1, 1884, inclusive.

Pursuant to published notices, all the above named claimants appeared at the local office on the same day, viz: June 27, 1884, to offer

* Action therein was had August 14, 1886, in the case of Gaspard Desuit *et al.* and the writ denied.

final proof and make cash entries covering the lands embraced by their respective filings. Special Agent Eaton of your office appeared on that day to cross-examine claimants and their witnesses, there being reason to believe that the settlements and filings had not been made in good faith.

The proofs were made, witnesses were examined, and cross-examined, and after several continuances the cases were transmitted to your office, with a report and a divided opinion by the register and receiver, dated December 17, 1884.

On a showing made by the special agent, together with a suggestion by the receiver that further and more conclusive evidence, not before obtainable, could be had, your office directed a rehearing, which was had, after which the record was again transmitted to your office, accompanied by the report of the register and receiver, which concluded with the recommendation that the proofs be accepted and cash certificates be issued in all the cases. This recommendation was not concurred in by you.

On the contrary, you find in substance that appellants went into the region where the lands are situated at the instance of C. E. Brown, or other members or agents of the John Martin Lumber Company; that their alleged settlements and whatever improvements there may have been were made in the interest of said lumber company; that the business of filing the declaratory statements was conducted by one attorney, pursuant to an arrangement between him and the company; that the expenses attending said filings were paid from money furnished by the company; that the claimants were paid by the company to take their claims and make a show of compliance with the pre-emption law, and were furnished with provisions from said company's logging camp which was in the vicinity of these claims; that the mortgages were to secure to the company, as a consideration for the money and provisions thus furnished, the lands covered by said pre-emption filings, said lands being valuable for the pine timber which they contained. Thus finding, you declared the filings fraudulent and held them for cancellation in the ten cases now here on appeal. Said appeal notes the following points of exception:

1st. That the findings of fact in your said decision stated are not warranted nor sustained by the testimony.

2d. That the conclusions of law in said decision stated are incorrect and erroneous.

3d. That you erred in holding, upon the record before you, that the pre-emption claims of said claimants were fraudulent and invalid.

4th. That you erred in refusing to direct the district land officers to accept the purchase money tendered by said claimants, upon the due and sufficient proofs made by them, and to issue the usual certificate of purchase thereon.

5th. That you erred in holding the pre-emption filings of the said claimants for cancellation.

Without considering the above specifications of error separately, or here reviewing in detail the testimony in the case, which is quite voluminous, I may say that a full and careful examination of the whole record furnishes nothing which in my judgment warrants a conclusion different from that arrived at in your decision.

It is strenuously urged in behalf of appellants that there is no evidence of fraud or bad faith on the part of the pre-emption claimants; that they having furnished, in accordance with the law and regulations of the Land Department, the requisite and customary final proofs, are entitled to final certificates, and I am asked to direct that such certificates issue.

If there were no other question than the acceptance of the proofs on their sufficiency, it would not, I take it, be seriously contended that such proofs must as a matter of course be accepted and certificates issue thereon, simply because the proofs are technically in form, though for one or more reasons they are deemed unsatisfactory by the Land Department. But more than that is here involved. The good faith of the pre-emptors has been attacked, and you find that fraud has been perpetrated in connection with these filings and proofs. It is objected that your decision relies upon the testimony of James Smart, who had made a filing in the same neighborhood and under the same circumstances as the appellants, and C. E. Brown, a member of the lumber company, utterly ignoring the testimony of the nineteen claimants who made their final proofs. It does not appear that the evidence of bad faith now rests upon the testimony of any one or two persons. Smart in view of the time, and the circumstances under which his own filing was made, was in position to testify knowingly that the filings by the appellants, as well as his own, were made under an arrangement with and for the benefit of the John Martin Lumber Company. He did so testify. Though subjected to a long and searching cross-examination, his testimony was consistent throughout. More than this, he is now substantially corroborated by nine of the nineteen men who offered final proofs, and who now say that their respective filings were made not for their own benefit, but that they were hired to make them by C. E. Brown, a member of the John Martin Lumber Company. What these nine parties admit is just what Smart had testified to. This goes far to strengthen his testimony as to the remaining ten claimants. If his statements are shown to be true as to nine of the nineteen pre-emptors, a very strong reason is presented why full credence should be given to his statements as affecting the remaining ten. His testimony stands unimpeached and to a great extent corroborated and sustained not only by direct testimony, but by admissions of the claimants and their mortgagees, and by facts and circumstances which in themselves point very strongly in the direction of fraud, as tending to show that these pre-emptors did not

settle and file upon these lands in good faith for the purpose of acquiring them for themselves in accordance with the letter and spirit of the pre-emption law, but that their intention was to secure them for the benefit of another, pursuant to an arrangement to that end.

What are some of these circumstantial facts?

The claims were all prepared and presented by one attorney, who was also attorney for the lumber company. He by his personal check paid the publication and land office fees necessary in making final proof in all the cases, though the money had not been advanced to him so to do. The filings were all made on the same day. The final proofs were also all made on the same day, the claimants testifying for each other.

In nearly all the cases now here on appeal one or more of those who have admitted their bad faith and the fraudulent character of their claims, appeared as witnesses on final proof.

All of the pre-emptors are single men, and were found to be absent from their respective claims immediately or soon after their offer of final proof.

The mortgages are for sums ranging from \$900 to \$1,200, in each instance. These amounts, if not nearly or quite the full value of the lands upon which the mortgages were given, are far in excess of the cost to the claimants of said lands, since their improvements are slight and the government price (not yet paid) is only \$200 in each case, and, in view of the alleged poverty and evident want of thrift on the part of the claimants, seem entirely beyond their ability to pay, even if they so intend. Said mortgages, therefore, virtually amount to a transfer by deed of the claimants' interest in the lands to the mortgagees, although final certificates have not issued. These and other circumstances, while they may not in themselves, taken singly, constitute evidence of fraudulent intent, when considered in their relation to each other and in connection with the testimony in the cases, do much to aid to a correct judgment on said testimony.

It is urged, however, by counsel that the testimony of the nine claimants, in which they admit bad faith, is not entitled to consideration, in its bearing either upon their own claims or those of the others, their associates, because they contradict their own corroborated testimony taken on final proof; that, the mortgages having been taken on the faith of their first statements, to accept their second statements as true and to cancel the entries would be to allow them to defraud their creditors, the mortgagees.

To these suggestions the answer is that the government deals only with the claimants, and can not undertake to look beyond them to ascertain whether in attempting to defraud the government they have or have not at the same time wronged some one else. The mortgagees were presumed to know, and it appears did know, the status of the lands and the character of the claimants' title thereto. The transactions through which they assert an interest in these claims were solely

between them and the claimants, and were at their own risk. The contradictory statements of the nine claimants can not be regarded as even neutralizing their testimony, in view of the fact that their first statements were those of interested parties testifying in their own behalf, while their later statements are adverse to their interests as claimants.

While their admissions and testimony bear more directly on their own individual claims, which are considered and disposed of in another decision on an application for certiorari, they are, as has already been indicated, not without weight in the consideration of these claims in which appeal has been allowed, when it is remembered that all the claimants were so closely associated in the matter of making and attempting to prove their claims as to render the whole proceeding practically one transaction, so that the proof or rather the admission of fraud as to the nine claims (ten including Smart's which was filed on the same date as the others, but relinquished before final proof) tends strongly to prove fraud as to the other ten.

Upon a full examination of the record and a careful consideration of all the evidence, direct and circumstantial, I am convinced of the utter want of good faith on the part of these claimants and affirm your decision.

TOWNSHIP E— RIGHT OF PRE-EMPTION.

LOVELL v. MAYNE.

The preferred right to purchase a lot is accorded to the actual settler thereon, and such settler may buy an additional lot upon which he has substantial improvements.

Acting Secretary Muldrow to Commissioner Sparks, August 12, 1886.

I have considered the case of Thomas Lovell v. Meadard Mayne, involving Lot 5, Block 20, townsite of Ketchum, Hailey, Idaho, land district, on appeal from the decision of your office of May 7, 1885.

It appears that on June 27, 1882, Mayne filed declaratory statement under Sec. 2382 of the Revised Statutes for Lots 5 and 7, Block 20, in the townsite of Ketchum, claiming settlement on June 22, 1882. On August 1, 1883, he made final proof and payment for the same and received cash entry certificate therefor.

On July 10, 1882, Lovell filed declaratory statement for Lot 5, Block 20, and Lot 3, Block 13, claiming settlement June 30, 1882.

No protest seems to have been filed by Lovell at the time Mayne made final proof; but on November 30, 1883, a rule was laid upon the former to show cause, within sixty days why patent should not issue to the latter. On the showing thus made a hearing was ordered and had at the Hailey land office on March 3, 1884.

On the testimony then submitted, the register and receiver recommended the cancellation of Mayne's cash entry as to Lot 5, and that

Lovell's declaratory statement be allowed to remain of record subject to his future compliance with the law. On appeal by Mayne your office reversed the finding of the local officers, held for cancellation the declaratory statement of Lovell, and held the cash entry of Mayne intact. From this judgment Lovell, in turn, has appealed, and on his appeal the case is now before me.

Section 2382 of the Revised Statutes, after providing for the location and survey of townsites upon the public lands, the division of the same into blocks and lots, the filing of the plats thereof in the General and local land offices, and the disposing of said lots at public and private sale, provides further that "any actual settler upon any one lot and upon any additional lot in which he may have substantial improvements, shall be entitled to prove up and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for public sale."

The language of this section, which is a literal transcript of the text of the original act of July 1, 1864 (13 Stat., 343), is somewhat ambiguous and involved, and has heretofore been the subject of different constructions, as it is now in the case under consideration.

It is insisted on the one side that the plain language of the section requires that a party pre-empting two lots must be an "actual settler" upon both, and that therefore the settlement here spoken of was not meant to embrace inhabitancy, or personal residence, inasmuch as it would be impossible for the same person to have a personal residence upon, or inhabit both lots at the same time. But that the act meant settlement, pure and simple, without the requirement of residence or inhabitancy upon either lot. On the other side, it is contended that the intention of Congress was to give to one who settled and actually resided upon one lot, "any additional lot in which he may have substantial improvements."

The former contention is supported by the opinion of Assistant Attorney General Smith, of this Department, in the case of *Allman v. Thulon* (1 C. L. L., 690) and the latter construction of the act is upheld by your predecessor in *Frank's case* (2 L. D., 628), and in *Elmer v. Bowen* (4 L. D., 337). This last case came to this Department on appeal, and the decision below was affirmed by Acting Secretary Muldrow, on January 23, 1886. In the affirmance, the law was not discussed, but it was briefly stated that the rulings of your office, in said case, were in accordance with the law. In the decision thus affirmed it was distinctly held that settlement followed by actual residence, as under the pre-emption law, was required as to the first lot; and substantial improvements alone upon the additional lot. And a careful consideration of the whole subject convinces me that the above conclusions are correct.

Several witnesses, and the principals on each side, testified at the hearing and though some of the testimony is apparently conflicting on one of the material points involved, I have but little difficulty in arriv-

ing at a conclusion. Full compliance with the requirements of the law as to settlement and residence by Mayne upon lot 7 is clearly shown by the evidence; but his right to lot 5, by virtue of either settlement or improvement, is by no means clearly made out. He does not claim that he ever used or occupied said lot, or made any improvements thereon; but bases his whole claim to the same on the ownership of a log cabin, erected thereon by another party, and which Mayne claims is rightfully his property by virtue of a gift; and which he further asserts he was prevented from using by the objections and wrongful occupation of Lovell. But the testimony produced by him fails to show a right to said cabin in those under whom he claims; whilst the testimony presented by contestant establishes the ownership of said cabin and the possessory right to said lot in those under whom Lovell claims, long prior to and at the time of Mayne's filing; its sale about that time to Lovell, and prior to his filing; the erection of valuable improvements thereon by him; his use and occupation of it continuously and uninterruptedly thereafter up to date of hearing.

On this evidence Mayne's cash entry must be canceled as to lot 5, inasmuch as he never had any substantial improvements upon the same.

Inasmuch as Lovell is not seeking to make final proof under his declaratory statement for the two lots embraced therein, the time has not arrived to pass upon his claim to the same; and nothing herein is to be construed as either affirming or denying it; consequently his filing should remain intact upon the record.

The decision of your office is reversed.

PRACTICE—HEARINGS—APPEAL.

McMAHON v. GREY.

If it appear that the evidence submitted is not sufficient to warrant cancellation the government may institute an independent inquiry under Rule 72 if deemed advisable.

An appeal will lie from a decision of the General Land Office holding that the evidence does not justify forfeiture of the entry and ordering a further hearing.

Acting Secretary Muldrow to Commissioner Sparks, August 12, 1886.

In the matter of the contest of Edward J. McMahon v. James A. Grey, involving the SW. $\frac{1}{4}$ of Sec. 28, T. 144 N., R. 55 W., Fargo, Dakota. I am in receipt of the petition of said McMahon for an order under Rules 83 and 84, directing the certification of the papers in said case, on the ground that his rights are prejudiced by your decision of February 3, 1886, from which you have refused to allow him an appeal.

It appears from the records before me that in September, 1885, McMahon instituted contest against Gray's timber culture entry, alleging fail-

ure to comply with the law, and that at the hearing in the following month the contestant and two others gave testimony in support of said charge. The local officers, on motion, dismissed the contest on the ground that the contest allegations were not sustained, and thereupon the contestant appealed. Your office, by decision of February 3, 1886, sustained the appeal, in the following manner, namely:

"While it is true that the testimony introduced, owing to its negative character, is insufficient to warrant the cancellation of the entry, I am of the opinion that such a showing was made as, coupled with the fact that no evidence was introduced on behalf of the defendant, to constitute a proper case for further investigation, in order that the good faith of the entryman may be affirmatively shown if he desires to have the charge against his entry dismissed. (See Practice Rule 72.) The appeal is therefore sustained, and McMahon's affidavit of contest is herewith inclosed to be used as the basis of a new hearing, to be had after due notice to the parties interested."

From this decision McMahon appealed to the Department, protesting against the expense and delay of a new hearing, for the reason that he had offered the best testimony at his command, and alleging among other errors the following, to wit:

"Said decision is contrary to law and the facts, as shown by the evidence produced and submitted by said plaintiff.

"The testimony and facts of record in the case warranted the cancellation of said entry, and were clearly sufficient to make out a prima-facie case; i. e., a case which compels the cancellation of said entry if not contradicted."

On receipt of said appeal your office ruled on May 21, 1886, as follows:

"As the ordering of hearings is a matter resting in my discretion from which no appeal will lie (see Practice Rule 81), McMahon's appeal will not be entertained or forwarded to the Department at this stage of the case."

The foregoing state of facts is such that I am enabled to dispose of the questions involved without resort to the contest papers, and I will therefore treat the case as though the petition for certiorari had been granted.

I think it very clear that there is error in the decision complained of. At the time that the contestee moved the dismissal of the contest, for want of evidence to sustain the charge, the status of the controversy was this, to wit, that the contestant, who had rested on the evidence produced, either had or had not established a prima-facie case; if the local officers held that he had established such a case, the contestee was bound to make his defense, or submit to the judgment of cancellation; if they held that he had not established it, judgment dismissing the contest properly followed. The former ruling is sustained by the case of James Copeland (4 L. D., 275), and the latter is in analogy to the practice in judicial tribunals. The finding of your office, therefore, that McMahon had not made out a prima-facie case, and the ruling that not-

withstanding this his appeal must be sustained, are manifestly inconsistent. On the other hand, if it was proper to sustain the contestant's appeal, the judgment should have been that the contestee proceed with his defense on a day certain or his entry would be canceled.

The object in view in your ruling sustaining the appeal, notwithstanding the admitted defect in the evidence, was evidently to protect the interests of the government in the land in controversy. Apparently there was sufficient evidence to satisfy your mind that a full inquiry ought to be instituted into Mr. Grey's doings subsequent to entry. The propriety of this view I do not question, but I am quite clear that the object sought could not be attained in the manner proposed in the decision. For it is averred by the contestant that he has no further evidence to submit, and you have already held that the evidence submitted "is insufficient to warrant a cancellation of the entry;" wherefore if the entryman should at the new hearing refuse to offer evidence on his own behalf, there would appear to be no recourse but to dismiss the contest. To cancel his entry, on his refusal to show his good faith affirmatively, as your decision suggests that he must do, would seem to be in violation of the statute, which declares the entry forfeited for non-compliance with the law only in the event that such non-compliance is proved in the contest.

In my judgment, the better procedure in a case like that at bar, where further inquiry is deemed advisable, is for the government to institute an independent investigation in the usual way after final disposition of the contest. Such, I think, is the proper method of enforcing the latter clause of Rule 72, in so far as it is applicable to such cases.

Your said decision of the third of February, though sustaining McMahon's appeal from the ruling of the local officers, is injurious to him in directing a new trial, and it was therefore subject to an appeal by him to the Department. It finds that he has not made out a prima-facie case of non-compliance with law, and, as his appeal to the Department challenges the correctness of this finding, he is entitled to have it reviewed. You will therefore please allow said appeal, and in the usual course forward it to the Department. The order for a new hearing, which I think was not discretionary in this case, is hereby vacated.

MOTION FOR REVIEW DENIED.

WALKER *v.* SNIDER.

Motion for review of departmental decision of February 12, 1886 (4 L. D., 387), was denied by Acting Secretary Muldrow, August 13, 1886.

PRIVATE CLAIM—FORM OF PATENT.

TOWN OF TECOLOTE.

A confirmatory statute is effectual in passing title, and the patent issued thereunder should follow the provisions contained in such statute.

Acting Secretary Muldrow to Commissioner Sparks, August 13, 1886.

I have considered the appeal of Thomas B. Catron, for himself and other owners, from the decision of your office, dated April 11, 1885, holding that the patent of the Tecolote grant, in the Territory of New Mexico, confirmed as private land claim No. 7, must follow the confirmatory act.

It will be unnecessary to recapitulate the proceedings relative to the confirmation of said grant, which are clearly and fully recited in the decision appealed from. The sole question raised by the appeal is, who are the proper parties to be inserted in the patent as patentees? Shall the patent issue to Salvador Montoya and others, their heirs and assigns, or shall it issue to the town of Tecolote, and to their successors and assigns?

It appears, as stated in said decision, that said grant was confirmed, with others, by the act of Congress, approved December 22, 1858 (11 Stat., 374), which is entitled "An act to confirm the land claim of certain pueblos and towns in the Territory of New Mexico." Said act provides that, besides the pueblos therein named, "also claim No. 7 of the town of Tecolote, in the county of San Miguel be and they are hereby confirmed, and the Commissioner of the Land Office shall issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor general, and shall cause a patent to issue therefor as in ordinary cases to private individuals."

A careful consideration of said confirmatory act can leave little doubt as to the intention of Congress. The title of the act, which in cases of doubt may be considered in arriving at the intention of Congress, clearly refers to the confirmation of land claims of pueblos and towns, and not of private individuals. There is nothing in the body of the act in conflict with the title. On the contrary, it is expressly provided that the Commissioner of the General Land Office "shall cause a patent to issue therefor as in ordinary cases to private individuals."

In 2d Cranch, 386, Chief Justice Marshall, speaking for the United States Supreme Court, says: "Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." See also *United States v. Palmer* (3 Wheaton, 631).

It is insisted by the appellants that the case of *Anton Chico* (1 L. D., 295) is conclusive of the case at bar. But an examination of that case shows that said claim was confirmed as No. 29, by the third section of the act of Congress approved June 21, 1860 (12 Stat., 71), which materially differs from the act confirming the Tecolote grant.

It was held by the United States Supreme Court, in *Ryan v. Carter* (93 U. S., 78), and *Tameling v. U. S. Freehold Co.* (Ibid., 644), that a confirmatory statute passes a title as effectually as if it in terms contained a grant *de novo*, or as if a patent was issued. See also *Whitney v. Morrow* (112 U. S., 693).

Since Congress with the whole record before it has confirmed said grant to the town of Tecolote, I am of opinion that the patent should follow the provisions of the confirmatory act. Said decision is accordingly affirmed.

RAILROAD GRANT—PRIVATE CLAIM.

REES v. CENTRAL PACIFIC R. R. CO.

Under the terms of the grant to this company its right to the odd-numbered sections within the granted limits attached to lands that were disembarassed at the date of definite location, though the same were included within the alleged limits of a Mexican private claim at date of the grant.

The date on which the President accepted the completed sections of this road between San José and Sacramento determines the time when the line of said road was "definitely fixed."

The extent of a Mexican private claim must be determined by the records in such claim as presented to the Board of Commissioners for confirmation.

Acting Secretary Muldrow to Commissioner Sparks, August 14, 1886.

On May 7, 1883, Thomas Rees offered to file declaratory statement, tendering fees therefor, claiming settlement upon the NE. $\frac{1}{4}$ of Sec. 7, T. 2 S., R. 2 W., M. D. M., San Francisco, California. On the same day the application was refused by the register and receiver, "because of the claim of the Western Pacific Railroad Company." Appeal was taken at once and on July 23, 1884, Acting Commissioner Harrison affirmed said decision, and the case is now before me on appeal from his decision.

By the third and ninth sections of the act of July 1, 1862, (12 Stat., 492) was granted to the Central Pacific Railroad Company of California "every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad, on the line thereof and within the limits of ten miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

By the fourth section of the act of July 2, 1864, (13 Stat., 358,) said grant was extended so as to give ten sections per mile on each side of the road within the limits of twenty miles.

The Central Pacific Company assigned to the Western Pacific the right to construct that portion of the road lying between San José and Sacramento, California, and Congress by act of March 3, 1865, (13 Stat., 504,) ratified the assignment, requiring the first twenty miles of said road to be completed in one year from July 1, 1865, and the entire road from San José to Sacramento to be completed within four years thereafter, and to connect with the Central Pacific at the latter point. Afterwards, on June 23, 1870, under the laws of California, the Central Pacific became successor to, by consolidation with, the Western Pacific.

It was held by your office that the land in controversy in this case was within the twenty miles granted limits of the above railroad grant, as extended by the act of July 2, 1864, to the Central Pacific, "the withdrawal for which became effective January 31, 1865. The line of the road was definitely located opposite said tract between February 25, and April 1, 1868."

It is contended on behalf of appellant that Acting Commissioner Harrison erred in holding that the railroad grant attached to the land in question, because—

1st, At the date of said grant the land was reserved, by operation of law, being within the claimed limits of the Mexican private land grant of Laguna de los Palos Colorados to Moraga and Bernal; and was so reserved until August 10, 1878, when survey of said grant was finally confirmed and patent issued.

2d, That when said survey was confirmed, the land in controversy, being surplus of said grant, became thereby determined to be part of the Mexican private grant of El Sobrante to the Castros; and continued in reservation, because within the claimed limits thereof, until February 23, 1882, when the survey of the last named grant was finally approved.

3, That, if the tract in question was not within the claimed limits of the foregoing grants, then it was within the claimed limits of the Mexican grant of San Lorenzo to Guillermo Castro and thereby placed in reservation, and so remained until the approval of final survey of this grant by the U. S. Circuit Court of California, on October 31, 1864, or until said survey was approved by the Commissioner, which was when patent was issued, February 14, 1865, it being insisted that the last date and approval is the correct one, because of the act of July 1, 1864, (13 Stat., 332.)

4, That the Acting Commissioner erred in holding that the line of the railroad was definitely located opposite said tract between February 25, and April 1, 1868, but that the same was located in contemplation of law when the map of route was filed in the General Land Office December 8, 1864, at which time the land in controversy was in reservation as above.

The plat of township 2 S., range 2 W., M. D. M., was filed in the land office at San Francisco July 8, 1878, withdrawn by order of Com-

missioner Williamson October 24, 1878, restored February 23, 1882, withdrawn again March 9, 1882, on order of Commissioner McFarland, and again restored April 16, 1883.

Nearly all of the questions involved in this case have already been discussed by this Department in other cases, and the patented and out boundaries of the above-named Mexican grants defined, as well as the construction of the particular railroad grant made, as affecting also lands located almost exactly as the tract claimed here by Rees, and like it asserted to have been covered by the claimed limits of the same Mexican grants. On the strength of these decisions, I might have been justified in declining to consider again the questions therein discussed and determined; but, whilst recognizing the weight of these former rulings, yet, being rendered in cases wherein Rees was not a party, nor the particular tract of land the subject matter of controversy, the rule of *res adjudicata* does not technically apply, and all the questions therein ruled upon and now presented in this case may be again considered. And inasmuch as the former decisions are assailed as erroneously made, and as very many other entries may be affected by the rulings in this case, it is concluded best to examine and consider anew all the matters presented by the record.

The land claimed by Rees—the NE. $\frac{1}{4}$ of Sec. 7, T. 2 S., R. 2 W., of M. D. M.—lies between the patented lines of Moraga and San Lorenzo, nearly due south of a straight line drawn through the former and north and west of, and very close to the lines of the latter—the southwest corner of said section is within the patented lines of the San Antonio grant, which lies to the west of the two former grants, bounded for some distance by San Lorenzo and its entire length by Moraga.

After the purchase and admission of California as one of the United States, it was known that its territory in many localities was covered by Spanish and Mexican private grants, some of them legal and complete, many of them illegal, fraudulent, or incomplete. To meet this state of facts, Congress passed the act of March 3, 1851, (9 Stat., 631,) establishing a system whereby it was intended that all private land grants in that State should be speedily settled.

The scheme thus adopted required that every person "claiming" lands in California, by virtue of "any right or title" derived from either the Spanish or Mexican government, should present the same to the Board of Land Commissioners, organized by the act, for adjudication, with the right of appeal to the U. S. Courts. And it was further provided that "all lands, the *claims* to which" were rejected or decided to be invalid, and "all lands the *claims* to which" were not presented within two years after the date of said act, should be held as part of the public domain.

Two years later the act of March 3, 1853, (10 Stat., 245,) was passed. This provided for the survey and pre-emption of the public lands in that

State, excepting, however, from the operation of its provisions "land claimed under any foreign grant or title."

It is to be noted that the "claim" which thus placed land in reservation, by excepting it from other disposition, was that which was presented to the proper tribunal for adjudication. What was claimed before such presentation and not included therein, or after adjudication, is not a matter to be considered in determining the extent of the reservation. Of the correctness of this position there ought to be no doubt on principle, because to hold otherwise would lead to inextricable confusion and uncertainty, always abhorrent to the law. Construction of the statutes by which such reservations were made confirm this view. For though remedial to the extent that they are intended to protect parties asserting a right or title under grant from a foreign government to the utmost extent of what they may choose to "claim," yet, inasmuch as the statutes are in contravention of that public policy which encourages the settlement and sale, and not the withholding of the public land from market, their intendment is not to be extended beyond the plain language used. Clearly, that requires that such "claim" must be presented for adjudication within two years from March 3, 1851, before the Board of Land Commissioners of California.

If authoritative construction be needed of the plain language of the statute, it may be found in the case of *Brown v. Brackett* (21 Wall., 387). The plaintiff there claimed through Ramon Mesa land which was within a Mexican grant made in March, 1844, to said Mesa. The claim for this grant as an entirety was never presented for confirmation in accordance to the provisions of the act of 1851; but a claim for a portion of the land covered by the grant was presented to the Board and confirmed to one Vasques. This confirmation did not embrace the land in controversy, but it was insisted that the confirmation of the Vasques claim involved a recognition of the validity of the whole grant to Mesa, and could be invoked to maintain his title to the remaining portion of the premises.

But the supreme court held otherwise, saying that though it was true that the United States tribunals, under the act of March, 1851, "were concerned only with the validity of the grants as they came from" the Mexican governments, and that "the decrees of confirmation and the patents which followed inured to the benefit of all persons deriving their interests from the confirmees," yet "every confirmation is limited by the extent of the claimants. . . . The confirmation covered nothing and protected nothing beyond the claim asserted." And because the claim to the particular land was not asserted before the Board, though clearly within the boundaries of the grant declared valid, the plaintiff was denied the right to recover.

Sometimes the decree of the Board of Land Commissioners or of the U. S. Courts definitely determined the rights of parties, as where grants were by specific boundaries and the extent of the land covered by them

could be readily ascertained without an official survey. Otherwise, the location and limits of the grant as confirmed were to be ascertained by approved survey and patent issued in accordance therewith. This was especially so, if the decree of confirmation was for a smaller quantity within larger out-boundaries. And until the final approval of such survey the entire tract claimed remained in reservation, or, as the supreme court expressed it, "the grantee and the government were tenants in common of the whole tract." *Frasher v. O'Connor*, 115 U. S., 107.

Now, what was the claim presented by Moraga on February 15, 1853, to the Board of Land Commissioners, and was the land in controversy within that claim?

In his petition filed on that day he "gives notice that he claims a tract of land known by the name of 'the Laguna of the Palos Colorados,' with the boundaries described in the grant thereof," which is said to have been made August 10, 1841, by Alvarado, then the governor of California. The petition concludes with the statement that "The original grant and a testimonial of said previous consent and authorization are herewith presented, with translations of the same, and also a certified copy of the original map, or *diseño*, presented with his petition for said land." We are thus referred to the translations and the map filed in the case, in order to ascertain with particularity what was claimed to have been granted.

From these papers, it appears that this grant was for a limited quantity of land, within larger out-boundaries, apparently named with some particularity, the land being described as a "tract" or "place," "known by the name of Laguna de los Palos Colorados, bounded on the north by the San Pablo creek, thence in a direct line to the east, including the spring of water which lies near the old inclosure (*corral*); on the south by the establishment of San Jose; on the west by the range of mountains up to the summit, and on the east by the ridge of Las Trampas," "of the extent of three square leagues, a little more or less, as explained on the map leaving the surplus that may result to the nation."

There are two maps in the record. One was the original referred to in and filed with the petition of Moraga, and the other is a colored copy of the same, identified by the witness Briones and the younger Moraga as correct, in their testimony before the Commissioners. On examination these maps show with considerable particularity the topography of the whole area, within the out-boundaries of which lie the granted premises, corresponding as to the descriptive features thereof with those mentioned in the grant by Alvarado, and the decree of the Board of Land Commissioners.

It will be observed, however, on inspection that in the figure representing the four cardinal points of the compass the east point is placed where the west point ought to be, and *vice versa*. This is such an ap-

parent error that it can mislead no one, especially in the face of the unmistakable calls for the north, east, and west lines. It is not necessary to quote authorities on a point so well settled. Apart from the error in the cardinal points of the compass, the *diseño*, or map, is much better than usually found in these cases. It shows on the north, well marked, the "arroyo de San Pablo," a straight line to the east, including the "Ojo de agua" near the "corral antiguo;" on the west is seen the ridge of mountains, with penciled trees thereon, marked "Cierra de los Palos Colorados;" on the east appears two ridges of hills, or mountains, with trees, the inside range broken by the "arroyo de las Trampas," which thereafter flows between the two—the outside mountain ridge, which is continuous, turning to the southwest and marked "Las Trampas."

About these three boundaries there is, I apprehend, no dispute, but it is important to note that the north boundary was definitely fixed—anchored as it were—by the Mexican authorities at the time of making the grant, it being shown by the record, filed before the Land Commissioners, that an agreement was then made between Valencia, the grantee of the Acalanes ranch, and Moraga, in the presence of and with the approval of the governor and the military commandant Micheltorena, wherein it is stated, "That from the source of a spring counting three hundred varas to the west towards the source of the San Pablo creek shall commence the dividing line between the lands of Senor Valencia and those of Senor Moraga; leaving to the former a piece of land one hundred varas square, within the tract that corresponds to the latter." This shows beyond any question that the northern line of Moraga—the exact *locus* of the grant claimed by him—was the southern line of Acalanes, granted to Valencia in 1834. This line is correctly located on the Boardman map.

The difficulty in the case arises with regard to the description of the southern boundary, as contained in the grant and decrees, viz: "On the south by the establishment of San Jose." Referring to the maps, which are so clear up to this point, we find nothing whatever to indicate that the southern boundary is the "establishment of San Jose," if we are to consider the mere buildings and enclosures of the Mission as constituting that establishment. On the contrary, the map shows Las Trampas, or a spur thereof, turning almost at a right angle to the south of west, marked at the point of turning, "Las Trampas." This continuation or spur of that mountain range goes on to the south of west, until it almost forms a junction with the "Cierra de los Palos Colorados," the western boundary, from which it is separated at the most southerly point on said map by an opening between the hills, through which flows a stream of water, marked "arroyo permanente," near which is located a spring of water, a house, and an enclosure—the said opening being known as a "portzuello."

If it be necessary to go outside of the *diseño* to find the southern boundary of the grant, which is not conceded, I can not admit the force of the contention that the words "establishment of San Jose" as here used meant the residence and grounds, buildings and curtilage, of the Mission proper as it then existed. But it is clear to my mind that the words used mean the lands, outside of these, used for grazing or any other purposes by the Mission authorities, under the laws or customs of the country, and, therefore, regarded and spoken of as part of that ecclesiastical establishment. The word "establishment" is found in a number of other grants, and is invariably used in the sense stated.

If the Moraga grant was not intended to go as far south as the Mission residence, where then did it meet the mission lands?

The answer to this question involves an inquiry into the nature and history of the Mission lands of Mexico, the result of which shows that the out-lying Mission lands of California were without definite boundaries, and held by no tenure other than that of sufferance. Originally these Missions, which were but few in number, occupied nominally the whole territory, the limits of one covering the intervening space to the next, there being no other occupants of these vast tracts except wild Indians.

In the course of time other Mission settlements were established, the former large limits were curtailed, and the adjacent land became attached to each new Mission, in the same manner as to the older ones, until the greater part of the Territory became dotted over with these establishments, engaged in the praiseworthy object of civilizing and christianizing the Indians. To this end large numbers of the young of both sexes were taken to the residences, where they were sought to be educated in industrial pursuits suitable to their sex and condition. It was to aid in this great purpose that the government permitted the use of these vast out-lying tracts of land for grazing, farming, or other purposes. It was never claimed that such lands were the property of the missionaries, or of the church, or that the tenure was other than temporary in character. It was conceded that, whilst the priests were allowed to administer this large property—the usufruct was for the benefit of themselves and pupils—it was resumable or disposable at the will of the nation. (See Carey Jones' report, p. 9. Dwinelle, p. 20: *Beard v. Federy*, 3 Wall, 478.)

From time to time, under the laws to encourage colonization, the Mexican authorities made such grants of these Mission lands as were applied for, reference of the application being first made to the reverend father, or other person in charge of the particular Mission, out of whose lands it was proposed to carve the grant.

In this way when application for the grant of San Antonio, adjoining on the west that of Moraga, was made in 1820, it was referred to the Reverend Father Duran, then in charge of the Mission of San Jose, who reported favorably thereon, with certain reservations in favor of

the Mission. So, in 1832, when Pacheco and Castro asked for grant of Las Juntas and San Ramon, north and east of Moraga, the application alleged that the latter place had formerly been used by the Mission, but was now unoccupied, and the matter was referred to Friar Gonzales, then in charge of the same mission, who reported, June 2, 1833, favorably to the grant. So the application of Amador, for part of San Ramon, southeast of Moraga, was referred to the Mission authorities, and reported upon favorably May 21, 1833, by Friar Gonzales, stating the land was no longer necessary for mission purposes.

From the records in these cases it is shown that prior to the application of Moraga, for the grant in 1835, the Mission on the east extended northward certainly as far as the south boundary of Las Juntas, afterwards on the granting of San Ramon to Pacheco and Castro became the south boundary of that tract, and when the more southern portion of San Ramon was granted to Amador, the Mission lands became in turn the southern boundary of the last-named tract.

From the record in the San Antonio grant, which adjoins Moraga on the west, it appears that the Mission lands extended certainly up as far as San Antonio creek, which is nearly due west from the southern patented line of Moraga. After the grant of San Antonio was made the San Leandro creek became the southern boundary of the grant, and consequently the northern boundary of the undisposed of Mission lands at that point.

In one of the original Spanish records of California, now in the office of the United States surveyor general of that State, under date of 1828, is found a description of the then boundaries of the Mission of San Jose by its minister, Friar Narcisso Duran. He states that "on the northwest it confines with the Arroyo of San Leandro, which divides it from the Rancho of the Sergeant Luis Peralta (San Antonio) and remains occupying in the form of a tongue of land some nine leagues in length, having its width from the mountain ranges to the sea . . . , one, two and three leagues in its greatest width. . . . The center of the nine leagues being the Rancho and Arroyo of San Lorenzo, at the distance of five leagues to the northwest of the Mission."

According to this description in 1828, after the lines of the San Antonio grant had been conceded, the San Leandro creek became the northwest boundary line of the Mission lands. Tracing that creek from its mouth up its main branch, after its great bend around and to the east side of the base of the coast range of mountains, which constituted the east boundary of San Antonio, and the west boundary of Moraga, the course would be east of north along the base of said mountains, until tract No. 2 of the patented lands of Moraga is entered, then turning due north, following the main branch of said creek it can be traced to its source, which is found in the "Laguna permanente," in the northeast part of the Moraga grant, as shown on the *diseño*. Doubtless the source is even beyond this in the mountains above, but is not so shown by anything before me.

This creek, well defined as it is in its course, was evidently understood by the friar Duran as the boundary between the Mission land and the San Antonio grant, as far as they were coterminous and beyond that point the creek was the western boundary of the Mission possessions up to its source.

It has already been shown that in 1832 the Mission lands extended in this direction as far north as the southern boundary of Las Juntas, and the locality where the San Leandro creek has its source is not far off.

Accepting then the San Leandro creek from its mouth to its source as the western boundary of the Mission lands, in 1835, when Moraga asked for his grant, probably about one-half of the proposed concession was composed of lands theretofore used and occupied by the Mission, hence his application was referred to the minister in charge—the same Friar Gonzales spoken of above—who, on September 30, 1835, reported in favor of the grant, asking that the right to cut lumber on said land be reserved to the Mission.

In 1841, when the grant of six hundred varas, part of San Lorenzo, was asked, the application was referred to the agent then in charge of the Mission lands, who approved of the grant, and when in 1843 the ranch of San Lorenzo proper was granted, express reservation was made of the right of the Mission cattle to pasture on the same. The grant of San Lorenzo was for six square leagues and adjoined on its north side that of Moraga.

The boundaries of the Mission lands as thus shown would make “a tongue of land” of about the location and description, and approximating the dimensions given by Father Duran in 1828 in the foregoing extract from the Spanish records.

There is no force in the contention that the Mexican act of August 17, 1833, secularizing the missions and curtailing their territorial limits within very restricted bounds was in force on August 10, 1841, when the Moraga grant was made and consequently the southern boundary therein described must have been the new and restricted limits of the Mission under that act. The answer is that, while said act was passed as above, it had not been fully enforced at the time the grant was made, for on November 7, 1835, the General Congress of Mexico decreed the suspension of the act of August 17, 1833, until such time as the curates mentioned therein should take possession, and until that time things were to remain “in the state they were in before said law was enacted.” See Halleck’s report, p. 154. It is true, that afterwards new regulations were issued for carrying into effect the act of secularization, and in 1843, at the time the grant of San Lorenzo was made, the Mission property of San Jose was in charge of Amador as mayor-domo under said rules; yet in that same year that Mission, with quite a number of others, was ordered “to be delivered up to the very reverend padres and said Missions shall in future continue to be administered by the very reverend padres in the same man-

ner as they held them before." (Halleck, p. 162.) From this contemporaneous history and legislation, it would seem that at the time of the application for the grant by Moraga in 1835 and at the date of the grant to him in 1841, the *status* of the so-called Mission lands was about what it had been prior to the passage of the secularization act of 1833.

Therefore, I have no difficulty in finding that the Mission lands at the time of the grant extended north of the southern boundary of Moraga; that said grant was carved, for the most part, out of the Mission lands, and that when this was done the southern boundary of the grant became the northern boundary of the Mission, and so continued to be the northern boundary thereof until the San Lorenzo grant was made.

From the foregoing, it would seem that it is not necessary to go outside of the *diseño* to find the southern boundary of Moraga, as recited in the grant, but that the same wherever found below the source and east of San Leandro creek and west of Las Trampas must necessarily be "bounded . . . by the establishment of San Jose."

The next point is to determine just where the grant terminates on the south. About this there is not much difficulty, I apprehend, in view of what has been said already.

At the time the claim was pending before the Board of Land Commissioners, there were four witnesses who testified relative to the boundaries of the grant. One of these, A. M. Castro, after describing the boundaries on the north and west, said, "at the south he has been told that the Portzuello was the boundary and the Trampas on the east;" and in describing its conformation he said, "The rancho is almost surrounded by mountains." Gregorio Briones, another witness, said the boundaries were pointed out to him by Moraga when he was about to apply for the grant. On being shown the *diseño*, he said it is correct, about the shape of the ranch; he recognized the descriptive features and said "they are laid down with correctness as it respects courses and distances." "On the south, it is bounded by the lands of the Mission of San Jose and a place known as Las Trampas." This testimony of Briones was corroborated by that of the younger Moraga. At a later stage of the case, after a survey of the grant had been made by La Croze, deputy surveyor-general, objections were filed to said survey by claimants, and in support thereof testimony was taken and produced in the district court. Salvo Pacheco, a witness, swore that he made the *diseño* at the request of the elder Moraga to file with his application for the grant; that the black lines were intended to represent the exterior boundaries of the grant. Martinez, another witness, testified that he was personally acquainted with the boundaries of the ranch prior to 1840, and its southern boundary was "the Portezuello de las Trampas, and the ridge of hills running from these towards the Redwoods." (Los palos Colorados.) Taking the *diseño* and this testimony, can there be any doubt that the southern boundary of the grant was the

land of the Mission at the point where is located on the *diseño* Las Trampas and the Portezuello? It seems too plain to admit of question.

On September 12, 1833, your office directed the surveyor general of California to locate the Cuchilla, or ridge of Las Trampas in connection with the public surveys. The map made in pursuance of this is now before me and the topography of the country as delineated thereon corresponds in a remarkable manner to the descriptive features of that part of the *diseño*, the only variance being that the ridge of Las Trampas trends more in a southwesterly course than in the *diseño*. This line of Las Trampas is laid down as in the Higley survey and is in my opinion certainly correct so far as that location is concerned. It passes through the N. $\frac{1}{2}$ of Sections 27 and 28, and the S. $\frac{1}{2}$ of Sections 29 and 30, of T. 1 S., R. 2 W., N. D. M., running three sections north of the land claimed in this case by Rees.

Finding this to be the correct southern line of the "claim" made by Moraga before the Board of Land Commissioners, I must hold that the land in controversy never was within the claimed limits of the Moraga grant.

Much has been said in argument on both sides as to the legality and correctness of the Higley and other surveys in the Moraga grant. With the questions thus raised I do not propose to deal, as it is not deemed necessary in determining the matter now under consideration. Though it may be remarked, in passing, that none of said surveys locate the southern boundary of said grant further south than I have done above, and consequently none of them place the land in controversy within the limits of the Moraga claim. The inquiry here is, whether the land claimed by Rees was within the claimed limits of the Moraga grant? I decide that it never was within such limits, and without determining whether the Higley survey was properly made or not, whether binding or not on the parties interested in the grant, I hold that the southern boundary of the grant as claimed is correctly located on the plat of said survey. The fact that the patented lines of said grant as shown by the Boardman survey, at one point, extend a short distance south of the line of the Higley survey, does not weaken the conviction of the correctness of my conclusion. The Boardman survey was made under order of the United States circuit court and no special direction was given for extending it south of the Las Trampas as was done. The survey when made, after contest before your office, was accepted by all parties, approved and patent issued in accordance therewith, and it can not overrule my judgment in the present case.

The next inquiry is, was the land in question within the claimed limits of El Sobrante grant?

The two Castros, claimants under this grant, on May 26, 1852, filed two joint petitions before the Board of Land Commissioners, in both praying for confirmation of said grant. One of these petitions is unsigned; and the other is signed by John Wilson and H. W. Carpentier,

as attorneys for petitioners. So much of the unsigned paper as is material to the present inquiry shows, that the two Castros on April 22, 1841, petitioned the governor of Upper California "to grant them all the vacant (sobrante) land *lying in between* the Ranchos of San Antonio, San Pablo, Pinole, the Rancho of Valencia and the Rancho of Moraga, being the *surplus lying between* these several ranches." The other petition filed before the Board states that the application to the governor of California was "for a grant of all the vacant (sobrante) land *lying between* the Ranchos San Antonio, San Pablo, Pinole, Valencia, and Moraga, being surplus or overplus *left between* the said ranches after the boundaries to the ranchos shall be ascertained and settled." Both petitions show that the grant was made as prayed. No diseño was filed as required by the Mexican law, inasmuch as the boundaries of the named ranches had not been fixed.

On July 3, 1855, the Board confirmed the claim, the decree stating that "The land of which confirmation is hereby made . . . is the surplus (sobrante) which, on the 23d day of April, A. D. 1841, the date of the decree of concession to the present claimants, existed, lying between the tracts known as Ranchos of San Antonio, San Pablo, Pinole, Moraga and Valencia, reference being had to the original expediente and grant on file in this case." This decree became final in the United States district court in 1857.

Here, then, we have "the claim" of the grantees of El Sobrante twice stated to the Board of Land Commissioners—the one statement is for "land lying *in between*" the five named ranchos, and the other for "land lying between" said ranchos, it being described in one paper as "the surplus lying between," and in the other as "surplus or overplus left between" the five ranchos.

To my mind it is clear that "the claim" as above presented can not be made to cover the land herein claimed by Rees.

What he pretends to is, that the tract was within the out-boundaries of Moraga—on the south side thereof; which point, it is apparent, can not by any possibility be held to be "between" any of the named grants. It can not be sobrante of Moraga, because I have shown there is none south of its patented line at this point. Not being "between" any of them, nor surplus, or sobrante of the Moraga, or any of the other grants, the contention that said tract was reserved because within the "claimed" limits of the Sobrante as presented to the Board utterly fails.

After the decree of the Board had become final in the United States district court in 1857, on March 27, 1863, by stipulation between the United States district attorney and Carpentier, attorney for claimants, an order was obtained to amend the decree so as to embrace land "lying between [or within the exterior boundaries of] the tracts," etc.—the words between brackets being the amendment. On July 26, 1866, after argument and consideration, said amended order was vacated, the court

declaring it "had no power or jurisdiction to enter said order," and the decree thereafter remained as originally made by the Board. When the matter of the survey of the Sobrante grant under this decree was before your office and afterwards on appeal before this Department, it was insisted that said decree was ambiguous, that by a proper construction of it and the grant, the latter embraced not only the lands lying between the five named ranchos, but also all the lands lying within the exterior boundaries thereof, and further that the exterior boundaries of the Moraga grant extended on the south beyond the patented lines of San Lorenzo, and consequently included the land now sought to be pre-empted by Rees.

Mr. Secretary Kirkwood, on February 23, 1882, decided adversely to these pretensions, holding that the claim as presented and confirmed was only for land lying between or partly surrounded by the five ranchos. On April 4, 1883, Secretary Teller declined to review said decision and patent was issued in pursuance of same.

It is contended now that these claims and pretensions of the confirmees or those claiming under them—the attempted amendment of the decree in the district court and in the matter of the survey, so as to embrace the exterior as well as interior lands, (those between as well as those outside the five grants,) should be accepted as evidence that such claim had always been made; and held the tract in reservation until the final adjudication of said claim by Secretary Teller on April 4, 1883, the lands all this time being *sub judice*.

I can not concur in these views. The attempt to alter the decree was a mere futile act, determining nothing though showing that the confirmees thought it did not cover the pretensions then set up, and which do not seem to have been before entertained by them, at any time within the preceding eleven years, which had elapsed since their claim had been presented for confirmation, as shown before.

The re-assertion of these pretensions in the matter of the survey was but an attempt to do indirectly what had been formerly sought to be obtained directly by the change in the language of the decree. Both of these efforts properly and signally failed in the view of the very plain and unambiguous language used throughout the whole case.

It was competent for the Castros to have set up a claim to any land they might choose to select under their Sobrante grant, and the assertion of such claim before the Board would of itself have placed the land in reservation. But having set up a claim for land "lying in between" five certain ranchos, they can not after final decree giving them exactly what they asked for, be allowed to say that they had set up also another and different claim. The record is conclusive on this point and acts as an estoppel on them and those claiming under them. The claim was for land "lying in between" certain ranchos, and now it insisted this meant land lying on the "outside" of said ranchos. I see no ambiguity whatever. The contention is too baseless to be consid-

ered while language is capable of conveying a meaning, and intelligence remains to comprehend it.

But it is further insisted that inasmuch as said decree was actually amended on March 27, 1863; which amendment remained of record from that time until July 26, 1866, a "claim" to the land within the exterior boundaries was actually in existence—recognized in the formal decree of the court, not only as having been made, but as valid—at the time the act of July 2, 1864, increasing the grant to the railroad was passed, embracing within its limits the land in controversy; and that this asserted and recognized claim exempted the land from the operation of said grant, so long as the same thus remained of record.

To this the answer is twofold: (1) Even though a claim had been properly made to the sobrante land within the exterior out-boundaries of each and all of the five grants, there was no sobrante of the Moraga grant on the south, where the land claimed is situate, the patented lines being coincident with the out-boundaries of the grant, as described and claimed before the Board; and (2) the act of March 2, 1851, requiring all "claims" to be filed within two years thereafter, by no possibility can a claim, set up, so far as the record shows, for the first time ten years after the limitation fixed by said act had expired, be regarded as such a claim as would place the land in reservation under its provisions. Besides, the very tribunal which thus allowed the amendment to be made ordered the same to be stricken out on the distinct ground that it had been made by a tribunal without jurisdiction; and no appeal was sought to be taken from this ruling. Surely it is a most extraordinary contention to hold that such an act, confessedly extra-judicial, could confer any rights.

I therefore dismiss the pretence that the land in controversy was within the claimed limits of the Sobrante grant.

I proceed now to inquire whether the land in controversy was embraced within the claimed limits of the San Lorenzo grant.

This was a grant of six square leagues, contained in larger boundaries, which on the east, north and west are described in the grant and *diseño*, accompanying the expediente as follows: "By the Rancho of Senor Amador, by that of San Ramon, by that of Senor Moraga, by that of the Peraltas" (San Antonio), etc.

The petition filed before the Board claims the same boundaries, substantially, omitting, however, the call for the lands of Amador, and making San Ramon and Moraga the west boundary. The omission of the call for the lands of Amador is unimportant, inasmuch as they were the southerly part of San Ramon, and the call for that ranch might be fairly construed to embrace both.

Designating San Ramon and Moraga as the west boundary is unquestionably error in the petition; San Ramon being, in fact, part of the east and northeast boundary, and Moraga the north boundary, until the east line of San Antonio is met. But, independently of this,

the expediente, diseño and grant are filed with and made part of the petition to the Board, and are properly referable to in order to ascertain the grant sought to be confirmed. Within the boundaries of San Lorenzo as thus claimed is located the land in controversy.

The San Lorenzo grant was confirmed by the Board February 14, 1853, and this confirmation became final in the district court July 6, 1855; a survey was made in November, 1859, which was set aside and a new one ordered November 11, 1863. This order was vacated October 10, 1864, and a decree, fixing and defining the western boundary of the rancho, passed and further survey ordered, which was made and approved by the surveyor-general on October 17, 1864, and on appeal was affirmed by the United States circuit court October 31, 1864, and patent issued February 14, 1865.

From the foregoing, it appears that the land remained in reservation because of the San Lorenzo grant until final approval of the survey by the circuit court October 31, 1864, the right to appeal thereto in pending cases being reserved by act of July 1, 1864, for twelve months after its passage.

The next question requiring consideration is, whether this tract, being within the out-boundaries of the San Lorenzo rancho at the date of the passage of the act making the grant, was excepted from the operation of said act. The particular question involved is this: Are lands within the granted limits, which were within the boundaries of a private land claim at date of the granting act, but which were released from such reservation at date of the definite location of the road excepted from the grant?

My predecessor's answer, in the case of Central Pacific Company (2 L. D., 477), was in the negative; but as its correctness is denied by the appellant, I will re-examine the question. I know of but two cases in the supreme court of the United States which are supposed to answer it in the affirmative, namely, *Leavenworth, Lawrence and Galveston Railroad Co. v. United States* (92 U. S., 733) and *Newhall v. Sanger* (92 U. S., 761). But, upon examination of these cases, I am of opinion that they do not so answer it.

In the former case, the court adverted to the fact that the granting act contained no provision looking to the extinguishment of the Indian title to the lands in controversy, which had by treaty been reserved to the Osage Indians "so long as they may choose to occupy the same," and that there had been no action looking to such extinguishment at date of the grant; and they held that, regarding the intent of Congress as doubtful for this cause, the grant must be construed against the company, and as not passing title to the lands within the reservation at its date; but that in fact the proviso to the act, excepting from its operation "all lands heretofore reserved to the United States," removed all doubt, and made plain the intention of Congress not to grant them. Now, the Pacific Railroad grant does not contain the proviso just re-

ferred to, and, furthermore, at date of its passage the act of March 3, 1851, providing for the settlement of private land claims in the State of California, was in existence and in operation, and it was within the power of the government to determine the number and extent of such claims at any time. Wherefore the controlling facts in that case are not present in the case before me, and for said reason I cannot regard that decision as governing it.

In this case of *Newhall v. Sanger*, the decision was that certain lands, which were covered by a fraudulent Mexican claim at date of a certain withdrawal for railroad purposes did not pass to the company. But, in their concluding remarks, the court said: "As the premises in controversy were not public lands either at date of the grant or of their withdrawal, it follows that they did not pass to the railroad company." This remark has been by some construed to mean that as the lands were not public at date of the grant they did not pass to the company, whether or not they were public at date of the withdrawal. Without stopping to show why this view is palpably erroneous, it is sufficient to say that the court themselves have otherwise expounded their remark. In *Ryan v. Central Pacific R. R. Co.* (5 Sawyer, 260), the circuit court said that there was no doubt, under the decision in *Newhall v. Sanger*, "that the lands in that case would have passed to the railroad company if the Mokelumne grant had been finally rejected before the line of the road had become definitely fixed." This last case came in due time before the supreme court (99 U. S., 382), and they expressly affirmed the circuit court's construction; of the decision in *Newhall v. Sanger* they said: "It was admitted by clear implication that if the lands had been thus disembarrassed at date of the grant, or their withdrawal from sale, the elder patent would have been valid." See, also, the case of *United States v. Central Pacific R. R.* (11 Fed. Rep., 449) to the same effect. It is apparent, then, not only that these four last-mentioned cases do not answer the question in the affirmative, but that they answer it in the negative.

What the court actually ruled in *Newhall v. Sanger*, in reference to the question as to the date at which the grant took effect, is evident from their construction of that decision in the case of *Huff v. Doyle* (93 U. S., 588). Therein they held that land selected by the State of California, under the school-land grant, while within the out boundaries of a private claim, but notified to the Land Department after segregation by survey, passed to the State under the grant; and they said: "There is in what we have here said no conflict with the principles laid down in *Newhall v. Sanger*, (92 U. S., 761). In that case the claim under the Mexican grant called Moquelamos was still in litigation *when the road of the company was located*, and when the lands were withdrawn from public sale. These lands were not *then* public lands within the meaning of the grant under which the corporation claimed." From this it is clear that that decision is to be regarded as holding that the grant took

effect upon lands which were public at date of the location and withdrawal.

Whenever the Pacific Railroad act has been before the supreme court, and this question has arisen, they have fixed the date of definite location as that which determined whether there were reservations or appropriations excepting lands from the grant. In *Railway Co. v. Railway Co.* (97 U. S., 491) they say: "As to the intent of Congress in the grant to the plaintiff, there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route, without reservation of right *except such as were specifically mentioned*. The grant was made in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant *became definite*." In *Wood v. Railroad Co.* (104 U. S., 329) the court said: "The line of the defendant's road was definitely located in June, 1865, . . . and so much of it as has not been *previously* sold, reserved, or otherwise disposed of, or to which a pre-emption or homestead claim had not attached, *was thus appropriated* to the satisfaction of the grant." In *Railway Co. v. Dunmeyer* (113 U. S., 629) they said: "In the third section, or granting clause, there are excepted from the grant all lands which *at the time the definite location is fixed* had been sold, reserved, or otherwise disposed of, and to which a pre-emption or homestead claim had attached. . . . When the line was fixed, *then* the criterion was established by which the lands to which the road had a right were to be determined. . . . This filing of the map of definite location furnished the means of determining what lands had *previously to that moment* been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached. . . . In regard to all *such* sections, they were not granted. The express and unequivocal language of the statute is that *the odd sections not in this condition are granted*."

I think that the court could hardly use language more specific than the foregoing, in ruling that the exceptions and reservations from the grant are such as are found to exist at the date of definite location. And that this is the necessary conclusion from the act is evident from its language, which, in my judgment, was intended to grant the alternate sections which were public lands when the line of the road was definitely fixed, and not then sold, reserved, or otherwise disposed of, and to which a pre-emption or homestead claim may not then have attached. The grant of a certain number of odd sections per mile, to be designated by a subsequent location of the road, vested in the company a present interest *in the quantity of land* specified (*Rutherford v. Greene*, (2 Wheat., 196); *Fremont v. United States*, (17 How., 559); *Hornsby v. United States*, (10 Wall., 244); and as to *particular tracts* it was a float, and vested no title in them, until date of the definite location of the road, *Railroad Co. v. Fremont County*, (9 Wall., 89); *Leavenworth, Lawrence and Galveston R. R. Co. v. United States*, (92 U. S., 741); *Railway Co.*

v. Railway Co., (97 U. S., 491); but when so vested, the title to the particular tracts took effect, under the doctrine of relation, as of the date of the grant, *only for the purpose of cutting off intervening claims*, *Leavenworth, Lawrence and Galveston R. R. v. United States* (*supra*); *Railway Co. v. Railway Co.*, (*supra*); *Van Wyck v. Knevals* (106 U. S., 360); *Railroad Co. v. Barney* (113 U. S., 618). This being the language, intention, and legal effect of the Pacific Railroad act, it follows that the grant took effect on lands which were public at the date of definite location, notwithstanding they may have been within the out-boundaries of a private land claim at the date of the grant.

The remaining question for consideration, in the case before me, concerns the date when the line of the Western Pacific road is to be regarded as "definitely fixed." There are four dates to be selected from, as the record indicates, namely, that of filing the map of the entire and completed road, that of filing the map of the general route, that of surveying the line in the field, and that of acceptance by the President of the maps showing the completed sections of road. These I will consider in their order.

February 1, 1870, is the date upon which a so-called map of definite location was filed in the Land Department, and it was subsequently to the construction and the acceptance by the President of the entire line. This date is offered as that upon which title passed to the company. The granting act does not in terms require that a map of definite location shall be filed; it provides that title in the granted sections shall vest when the road is "definitely fixed;" and to hold that it does not vest until a certain map is filed, though this be not filed for days or years after the road is completed and accepted by the President, would be unreasonable. In all the railroad-granting acts which contemplate a map of definite location, it is plainly a map which was to be filed prior to the construction and acceptance of the entire line that was in the mind of Congress. In this manner the company might anticipate the time of actual construction, and check further appropriation of the land. When the road was actually constructed and approved, as provided in the act, the granted lands were legally earned and the company entitled to patent for them; and it would be absurd to hold that title to them could not vest until some subsequent period, and by the mere filing of a map called "a map of definite location."

December 8, 1864, the day upon which the map of general route was filed in the General Land Office, is offered as the date when the line was definitely fixed. If this map was filed as the map of "general route"—and the records show clearly that it was so regarded by all parties when it was filed—then it cannot be the map of "definite location." Section 7 of the granting act distinguishes between general route and definite location, and the supreme court have, in *Railway Co. v. Dunmeyer* (113 U. S., 636), distinguished between the two maps and ascribed to each a different purpose and value. It has been supposed by some that the last-named case is inconsistent with the case of New-

hall v. Sanger (92 U. S., 761), which ruled that title there did not pass because the land was appropriated on January 31, 1865, by a withdrawal *made upon the map of general route*; but an examination of the records of the court discloses the fact that the pleadings and arguments before the court treated the map of general route as the map of definite location, and conceded that the road was definitely fixed prior to said withdrawal. Wherefore the case of Newhall v. Sanger cannot be regarded as ruling that title in the company vested on filing the map of general route. Another ground, however, is urged in favor of this date, to wit, that the road was afterwards built substantially on the line of the map of general route, and, as no other map was filed prior to actual construction, this must be regarded as the map of definite location. Conceding the alleged facts, it must be apparent that, as the map was originally a map of general route, it must be shown that it was afterwards offered by the company and accepted by the Land Department as a map definitely locating the line in order that it may be so regarded. There is nothing in the record indicating that such a disposition of it was made, or that the company ever regarded itself as bound by it otherwise than as a map of general route. The question of the kind of map filed is one of fact and not of law, and there are no facts before me warranting me in finding that the map of definite location of the Western Pacific Company was filed on December 8, 1864.

The dates of actual survey in the field, in 1866 and 1868, are also offered as the dates when the line of the road was definitely fixed. Such was the early ruling of the Land Department (1 C. L. L., 361), but it was changed by the decision in Van Wyck v. Knevals (106 U. S., 360), which held that the route of a road is to be regarded as "definitely fixed" when it ceases to be the subject of change by reason of the company's filing a map finally indicating it. This ruling has been affirmed by the Court in several succeeding cases, namely, in Railroad Co. v. Herring (110 U. S., 27), Walden v. Knevals (114 U. S., 373), and Railway Co. v. Dunmeyer (113 U. S., 629). In the last-named case, which involved the Pacific Railroad grant, the court expressly say: "We are of opinion that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of definite location is the act of filing the map or plat of the line in the office of the Commissioner of the General Land Office." So long as this ruling stands the Land Department is bound by it, and must refuse to find that the road was definitely fixed at date of survey in the field.

The fourth and last date suggested is that on which the President accepted the map of the constructed road, and this, in my judgment, must in this case be taken as the date when the company's title to the granted sections vested. The ground upon which the supreme court has determined that the date of filing the map for that purpose is the date of definite location is "the necessity of having certainty in the act fixing this time." When certainty as to the line of the road is attained by an approved map filed for the purpose of showing the line as finally

fixed, it is evident that the ruling of the court is satisfied, whether or not the map be technically designated a map of definite location. It is the fact that the line is thus definitely fixed for the first time, and not the name by which the map definitely fixing it may be known, that constitutes the certainty; and from that instant, in contemplation of the granting act, title to the granted sections vests in the company. Now, the Western Pacific road did not file the usual map of definite location prior to construction, and the first date upon which the line of the road appears to be fixed with certainty is that on which the President accepted the maps of the constructed road. By said acceptance, there is no doubt, the road became definitely fixed, and hence said dates must be taken as the dates when title to the granted lands vested in the company.

In the case of the Western Pacific Company there were four such dates, on which the President accepted the four completed sections of the road between San Jose and Sacramento. The last of said sections, to wit, 20.16 miles, was accepted on January 21, 1870, and it is opposite to this section of the road and within the granted limits that the land herein in controversy lies. From what has heretofore been said, it is clear that this tract had been segregated from the Rancho San Lorenzo, and was public land at the time the line of the Western Pacific road was definitely fixed, and that consequently it passed to said company and its successors under the grant.

Your predecessor's decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION.

WISCONSIN R. R. FARM MORTGAGE LAND CO.

Under a grant of lands to a State for the purpose of aiding internal improvement, the application of the lands, or the proceeds of the same, to the trust, rests in the good faith of the State, and in the absence of statutory authority, the Department cannot control the discretion of the State in the disposal of said lands.

No action has been taken by legislative or judicial proceeding to enforce a forfeiture of the grant under which this company claims, hence the lands therein granted have not reverted to the United States, though the road was not constructed within the period prescribed.

The right of this company as the legal successor to all the benefits acquired by the State under the original grant, and the amendments thereto, was recognized in a decision of a federal court having full jurisdiction of the question, and such decision will be accepted as authoritative, and warranting the adherence of the Department to its former like determination.

It is accordingly held, in the absence of statutory direction requiring the application of the co-terminous principle, that for lands lost in place, opposite the southern part of the road, constructed within the time specified in the original grant, the State is entitled on behalf of the company to select and receive lieu lands from the indemnity limits in the northern half of said grant.

As in the construction of a statute the obvious purpose thereof should not be defeated by literal interpretation, the word "and" is construed "or."

OPINION.

Mr. Vivian Brent, of the Assistant Attorney-General's Office, to Secretary Lamar, August 13, 1886.

By your reference, I have considered the appeal of the State of Wisconsin from the decision of the Commissioner of the General Land Office of May 27, 1886, refusing its application to have certified to it, for the benefit of the Wisconsin Railroad Farm Mortgage Land Company, certain indemnity lands selected under the act of June 3, 1856 (11 Stat., 10), and holding said selections for cancellation.

That act of Congress granted to the State, "for the purpose of aiding in the construction of a railroad from Madison or Columbus by way of Portage City to the St. Croix river thence to the west end of Lake Superior and to Bayfield," every alternate (odd numbered) section to the width of six sections on each side of said road. In case of loss of any of said granted lands, the State was authorized to select, subject to the approval of the Secretary of the Interior, land sufficient to make up said losses "from the lands of the United States nearest to the tier of sections above specified," and within fifteen miles from the line of said road. Said lands were to be held by the State for the purposes of the grant. One hundred and twenty sections included in a continuous line of twenty miles of the road could be sold, and thereafter on the completion of twenty miles of the road then a like quantity of land might be sold, with the approval of the Secretary of the Interior; and so on, until the completion of the whole road. But it was declared that, if said road was "not completed within ten years, no further sales shall be made and the land unsold shall revert to the United States."

The State accepted the grant and in October of the same year conferred the whole, with right to build the entire line of road, upon the Milwaukee and La Crosse Railroad Company, making Madison the initial point of the road. The company accepted the grant, and, in order to raise money to build with, issued bonds, secured by mortgage, upon its franchises and the lands to which it would be entitled, and commenced the construction of the road, beginning at Portage and working westward towards the St. Croix river *via* Tomah. On March 6, 1857, with the approval of the State, the La Crosse and Milwaukee Company transferred to the St. Croix and Lake Superior Railroad Company the right to build that portion of the road running northward from the St. Croix river to Lake Superior and Bayfield, assigning also the right to that portion of the Congressional grant applicable to the same. But in the contract between the two companies the right of the La Crosse and Milwaukee Company to select lands within the indemnity limits of the other company north of the St. Croix river, for lands lost between Madison and the St. Croix river, was not surrendered or released, but expressly reserved to the first named company.

The maps of definite location of the entire route from Madison to

Lake Superior were filed at different times prior to July 17, 1858, and in the spring preceding the road between Portage and Tomah—sixty-one miles—was completed and has been in use ever since. It is with this sixty-one miles of completed road and the right to select indemnity lands for it north of the St. Croix river for those lost along its line that we are concerned.

The La Crosse and Milwaukee Company, having made default in the payment of its bonds, the mortgage to secure the same was foreclosed in the United States circuit court, the mortgaged property—including the interest of the company in the Congressional grant—was sold and deeded by the marshal to Wallace and White, who, on May 5, 1863, conveyed the same to the Milwaukee and St. Paul Railroad Company, who thus became owner of the sixty-one miles of completed road from Portage to Tomah and of the claim for lands earned by the construction thereof.

At this time, with the approval of the State, the entire line of the road from Madison and Columbus *via* the St. Croix river to Lake Superior and Bayfield had been allotted to and the grant of lands applicable thereto had become vested in several different companies for the construction of the specified portions of the routes, as follows, viz: that portion from Madison to Portage to the Sugar River Valley Railroad Company (afterwards the Madison and Portage); that portion from Portage to Tomah to the Milwaukee and St. Paul (by purchase); that portion from Tomah to the St. Croix river to a company of that name (afterwards the West Wisconsin Company); that portion from the St. Croix river to Lake Superior and Bayfield to the St. Croix and Lake Superior Company. This latter grant being subject to the reservation of the right of the La Crosse and Milwaukee Company to select indemnity lands north of the St. Croix river; but with exception of said sixty-one miles no part of said roads had been constructed. Matters were in this condition when Congress passed the act of May 5, 1864 (13 Stat., 66). The bill as originally reported from committee to and passed by the Senate made the grant direct to the St. Croix and Lake Superior and the Tomah and St. Croix Railroad Companies, to aid in the construction of their respective roads. In the House the bill was so amended as to conform to the act of 1856, making the grant to the State of Wisconsin, and as amended became a law.

This act did not provide for the construction of one continuous line of road, as did the act of 1856, from Madison *via* the St. Croix river to Lake Superior, but by the first section provided for the construction of a road from the St. Croix river northward to Lake Superior and Bayfield, and by its second section for a road from Tomah to the St. Croix river. The two sections are almost identical in language, and give in aid of each road the odd numbered sections to the width of ten sections on each side of each road, "deducting any and all lands that may have been granted for the same purpose by act of Congress of June 3, 1856,

upon the same terms and conditions as in said act." The indemnity limits were increased to twenty miles and said lands were to be selected in the same way as in the first act. It was also provided said selections should not be made "in lieu of lands received under the said grant of June 3, 1856; but such selection and location may be made for the benefit of said State and for the purpose aforesaid, to supply any deficiency under said grant of June 3, 1856, should any deficiency exist." By the fifth section the time "for the completion of the said roads in the act aforesaid of June 3, 1856," was extended for five years thereafter or until May 6, 1869.

Section 7 provided that on the completion of each twenty miles of road, the company entitled was to have issued to it a patent for the lands on each side "coterminous with said completed section."

It is obvious that this act was intended to be and was amendatory and supplementary to that of 1856. In no respect does it seek to repeal or restrict that act. Nor does it make a new grant; but recognizing and approving the scheme adopted by the State, which had brought about the existing condition of affairs, destroys for the future the continuity of the one road permitted by the former grant, by dividing the whole line into three parts; making the coterminous principle applicable to the two unconstructed parts, and giving an additional grant of land, but not legislating as to the third or constructed part. But there is nothing in the act from which any inference can properly be drawn that it was the intention of Congress in any way to impinge upon or impair rights acquired or vested under the former grant. Were such intention obvious, it could avail nothing, as Congress is powerless to accomplish such purpose.

It is also to be noted that there is no mention in said act of the road south and east of Tomah; the provision therein made applying to the future construction of the road from Tomah westward. Congress unquestionably was aware of the construction of the sixty-one miles of the road from Portage and Tomah, under the provisions of the act of 1856, and deemed properly that no further legislation was necessary on the subject. The road had been built, the lands earned and nothing remained to be done to enable the beneficiaries of the grant to enjoy its full fruition, but the selection, approval and certification of the lands.

On March 20, 1865, the State formerly accepted the grant of 1864, and the benefits of the same were conferred upon the companies then in control of said two lines, viz: the Tomah and St. Croix, and the St. Croix and Lake Superior.

In 1856, shortly after the State had conferred upon it the whole Congressional grant, the La Crosse and Milwaukee Company induced persons living along the line of its proposed route to aid in its construction, by giving negotiable notes, secured by mortgages upon their farms. Money was raised on those notes by the company and used in great

part in the construction of its road between Portage and Tomah. When the La Crosse and Milwaukee Company failed, said mortgages were foreclosed by the holders of the notes, and the property of the mortgagors sold, entailing great loss and hardship upon them.

In view of these facts, on March 6, 1868, the State Legislature incorporated the Wisconsin Railroad Farm Mortgage Land Company, on which was conferred the benefit of the land grant for the construction of the road from Portage to Tomah. Said act recited that the Milwaukee and St. Paul Company, as successor of the La Crosse and Milwaukee and owner of said road assented to the transfer, in consideration of which assent the State released said company from taxation upon its traffic. Afterwards the Milwaukee and St. Paul Company in due form assigned all its right and interest in and to said lands to the Mortgage Company.

There was subsequent legislation on the part of the State to confirm as far as possible the right to the lands in question in the Mortgage Company, notably in the act of March 23, 1872, which declares said company to be the legal successor of the State under the act of 1856, as to said lands, and also the successor of the La Crosse and Milwaukee Company as to the right reserved, in its contract of March 10, 1857, with the St. Croix and Lake Superior Company, to take indemnity lands north of the St. Croix river. And the governor was directed to carry out the provisions of said contract and convey to the Mortgage Company such lands as it might be entitled to.

On July 27, 1868, Congress passed an act (15 Stats., 238), authorizing the State of Wisconsin "to dispose of the lands granted and which may have enured and been certified" to it under the act of 1856, in aid of the construction of the road from Madison or Columbus *via* Portage to the St. Croix river, "for the benefit of" the Mortgage Company, "provided, however, that this act shall apply only to such lands as may be due the State of Wisconsin for the portion of the road already completed."

In the course of time, but not within the period fixed by the acts of Congress, the whole line of the railroad was constructed as provided in the act of 1856, from Madison or Columbus *via* Portage and the St. Croix river to Lake Superior and Bayfield, and all the land in place and much in the indemnity limits along said line has been from time to time certified to the State for the different companies claiming the same, and some of these certifications have been for the benefit of the Mortgage Company, but none of the companies have received the full amount of land to which they were entitled to under the grants. As to the details of these certifications, the number of acres and location of the lands, it is not necessary to inquire at this time.

In 1870 the Madison and Portage Railroad Company (successor of the Sugar River Valley Railroad Company), having completed the road between Madison and Portage, but after the time allowed by the act—

there being no land along the line of their road to satisfy the grant—demanded the right to make selections along the line of the road north of the St. Croix river. The Mortgage Company also asserted a similar claim. To enforce its said claim, in 1874, the Madison and Portage Company filed a bill in the United States circuit court for Western Wisconsin against the North Wisconsin Railroad Company, the Mortgage Company and the West Wisconsin Company, all claiming a right to said lands north of the St. Croix river. The West Wisconsin and the Mortgage Company answered and filed cross bills and the North Wisconsin and others answered. The case was tried before Mr. Justice Harlan, of the United States supreme court, Judge Drummond of that circuit and Judge Bunn, district judge. After elaborate argument and a patient investigation this tribunal rendered a decision, dismissing the claimant's bill and the cross bill of the West Wisconsin Company, but sustaining fully the right of the Mortgage Company to select lands according to its claim north of the St. Croix river, within the indemnity limits of the act of 1856. A Master was directed to ascertain the deficiency due the Mortgage Company and to satisfy the same, if possible, without disturbing selections already made by the North Wisconsin for road constructed.

From this decision no appeal was prosecuted and it became final. The report of the special master, specifying the tracts selected by him, was subsequently made and approved, and the lands so selected were patented by the State to the Mortgage Company, which in turn sold them to a large number of settlers. These lands so selected and patented were in due form selected by the State's agent, and lists of the same sent by the governor to the Commissioner of the General Land Office for certification to the Secretary of the Interior for approval. And it is on appeal from the action of the Commissioner refusing to certify said lists and holding the same for cancellation that the case is now before you.

Said decision seems to be based upon two principal objections: (1) That the proposed action of the State in disposing of the lands selected for the benefit of the Mortgage Company would be a diversion of the same from the purpose for which granted—an illegal act which the Commissioner is unwilling to countenance or aid; or (2) if not such diversion, then the Mortgage Company is only entitled to such lands as, being coterminous with the line of the road between Portage and Tomah, "may have enured and been certified" to the State under the act of 1856, prior to the passage of the act of July 27, 1868 (15 Stat., 23).

It would seem, upon reading it, that the opinion delivered by Judge Harlan had passed upon and decided both of the said questions adversely to the views expressed by the Commissioner. That case, it is to be remembered, was instituted to determine the right to make selections for the benefit of the Mortgage Company within the indemnity limits north of the St. Croix river, and to determine any right as to se-

lections already made and certified. The court, after discussing and showing the right and authority of the State to confer such privilege upon the Mortgage Company, says:

"If without the consent of Congress no such claim was maintainable under the act of June 3, 1856, nevertheless, in 1868, Congress authorized the legislature to dispose of the lands granted and which might have accrued and been certified to the State under the act of June 3, 1856, to aid in the construction of the road from Madison or Columbus *via* Portage to the St. Croix river for the benefit of the" Mortgage Company. "*Congress and the State seem to have concurred in desiring to provide full compensation in lands to the Farm Mortgage Company for the sixty-one miles of road constructed and in use prior to 1864.*" "The claim of the Wisconsin Railroad Farm Mortgage Land Company related to road constructed south of Tomah and neither that Company nor its predecessor were required to accept the provisions of the act of 1864. That part of the line described in the original act was not embraced by or referred to in that act, for the reason doubtless that it had in fact been constructed before its passage. It was therefore left under the operation of the act of June 3, 1856, and even if that act did not require deficiency lands to be selected upon the coterminous principle, it was competent for the State, *in view of the action of Congress*, after accepting the act of 1864 . . . to allow the Farm Mortgage Land Company to select the deficiency earned by its predecessors for constructed road out of such of the lands north of the St. Croix lake or river as were embraced in the indemnity limits, as prescribed by the act of June 3, 1856."

This language shows plainly that the court thought the act of Congress of 1868 fully authorized the making of selections north of the St. Croix river to satisfy the claim of the Mortgage Company, and that such claim was not to be restricted to lands coterminous with or opposite to the constructed portion of the road between Portage and Tomah, or to lands that had been certified to the State prior to the act of 1868. All these questions were raised and discussed, and all the positions assumed now were insisted upon by the adversaries of the Mortgage Company, except that there was no contest as to lands that had already been certified; the case relating wholly to selections to be made in the future.

This being so and the court authorizing such selections, "in view of the act of Congress," to be thereafter made north of the St. Croix river, for the benefit of the Mortgage Company, would seem to be conclusive on the subject. In the face of this, to assert that the act of Congress was restricted to past certifications is to stultify the court and hold that it did not understand what it was doing.

It is true, as stated, that the government was no party to those proceedings and therefore technically not bound by them. In other words, as to the government, the rule of *res adjudicata* is not applicable. But the decision was made by a federal tribunal, having full jurisdiction, presided over by jurists of eminent ability and national reputation, who, in order to have arrived at their conclusion, must necessarily have considered fully and carefully, and their elaborate opinion shows they did so consider, the whole subject matter before them and all the legislation bearing upon it. When a decision ren-

dered by such a tribunal, construing the very laws you are called upon to construe with regard to the identical subject matter, and determining the rights of the same parties, who are here asking to have the decree of that court, in their behalf, carried out, there should be made out a remarkable showing to justify the refusal of this Department to recognize that the matters determined by the court had passed in *rem adjudicatam*. No such showing is made in this case, no reason presented by way of argument for disregarding the solemn judgment of this court of competent jurisdiction, construing this act when properly before it, the Commissioner merely stating, by way of conclusion, that he thinks said act should be differently construed.

It seems to me that said act admits of but one construction, that put upon it by the court, and any other would make it nugatory and absurd. To hold, at this day, that it only authorized the State to dispose of such lands to the Mortgage Company as having been earned, had "been certified" to the State under the act of 1856, is to put Congress in the light of doing a vain and foolish thing. For the act of 1856 required no patent to issue to the State for earned lands, and the certification and approval by the Secretary of the Interior of the lists of lands presented by the State passed the title out of the government as effectually as a patent, and there was no authority in Congress thereafter to legislate in relation to such lands.

To read the statute literally it would unquestionably defeat its obvious purpose as disclosed by the proviso, which should dominate the whole act. But to apply to it the ordinary rules of construction of statutes, and either entirely eliminate the words "and certified" as surplusage, or read the "and" "or" the whole statute and every part of it is harmonious, and the purpose of Congress is plainly shown and easy to be carried out, whilst to adopt the other view would be to make the act entirely retrospective and operative only on lands which had passed entirely out of the control and jurisdiction of Congress. I disagree with the Commissioner, and hold that said act of 1868 applied to all such lands as at that time had enured *or* been certified to the State for the portion of the road completed between Columbus or Madison *via* Portage to the St. Croix river.

Nor do I think there is any force in the objection that the bestowment of said lands upon the Mortgage Company would be, independent of the act of Congress, a diversion from the purposes of the grant. The facts recited show that the purpose of that portion of the grant was accomplished in 1858, when the sixty-one miles of road between Portage and Tomah was completed. It was through the means and aid of the mortgagors mainly that it was built and their property went to pay for it. *Ex æquo et bono* they were entitled to the benefits of the grant, and any court would have so decreed in proceedings where the matter was properly presented. I can therefore see no immorality in transferring the claim for said lands to the Mortgage Company. On

the contrary, I think the action of the authorities most commendable. As I said before, this question too was necessarily considered and decided by Judge Harlan and his associates, for it is not conceivable that those eminent men would have taken jurisdiction of the claim of the Mortgage Company if the same was in violation of either the letter or spirit of the acts of Congress, or was a diversion of the grant from its proper, to improper, illegal, or unworthy purposes. Their judgment in this respect ought to be satisfactory. The case of the Chicago, Milwaukee and St. Paul R. R. Co. *v.* United States (14 U. Cls., 125), does not affect this conclusion. The court there decided that inasmuch as the railroad company then (1878) carrying mails over said road had not received the benefit of the land grant, it was not in contemplation of law a "land grant" railroad, and therefore the government ought not to deduct twenty per cent. of the amount due it for carrying the mails. But said court did not decide that there was an improper diversion of the grant; on the contrary, so far as said decision is applicable to the matters now under consideration, it recognizes the validity of the so-called diversion, and says expressly "*Congress having assented to this diversion of the trust property, the claimants also gave their consent,*" etc. This decision was affirmed by the supreme court (104 U. S., 687), but on another point, the court, saying that in its view the question whether the railroad company was a land grant company was immaterial, but if it had been the judgment of the court of claims would be affirmed on that point, for the reasons given—that is, that the supreme court would also have held that the so-called diversion was legal, "Congress having assented" to it. Thus we have the opinion of the court of claims that Congress had *assented* to the so-called diversion, and the *dicta* of the supreme court to the same effect.

In view of what has been said, and on a full examination and careful consideration of the whole case, I am satisfied the action of the Commissioner in the premises was erroneous, and advise the reversal of the same, and recommend that you cause the said selections to be examined, and such as said Mortgage Company, under the views herein expressed, may be entitled to and which have been properly made from the lands of the United States nearest the tiers of sections of granted lands along the line of the road north of the St. Croix River, you will direct to be certified to you for approval.

DECISION.

Secretary Lamar to Commissioner Sparks August 20, 1886.

I have considered the appeal of the State of Wisconsin from your decision of May 27, 1886, rejecting its application for certification of certain indemnity lands selected for the Wisconsin Railroad Farm Mortgage Company.

This claim rests on a grant of land by Congress to said State on the

3d day of June, 1856, to aid in the construction of the railroad from Madison or Columbus, by way of Portage City to the St. Croix River or Lake, between townships 25 and 31, and from thence to the southwest end of Lake Superior, and to Bayfield. The grant was of every alternate section of land designated by odd numbers for six sections in width on each side of said road. It was therein further provided that if upon the definite location of the road the land so granted had been disposed of by government sale or by pre-emption, it should be lawful for the agents of the State to select, subject to the approval of the Secretary of the Interior, indemnity therefor from the "lands of the United States nearest to the tier of sections above specified, and not farther than fifteen miles from the line of the road." It was also provided that the land should be held and sold by the State for the use and purpose of securing the construction of said railroad, and if the road was not completed within ten years the lands unsold should revert to the United States.

The grant was accepted by the legislature of Wisconsin, October 8, 1856, and on the 11th thereof said legislature conferred the grant in its entirety on the La Crosse and Milwaukee Railroad Company, which Company accepted the grant the same day.

The facts connected with the administration of this grant by the State are voluminous and complicated; but your statement of them is so full and clear as to render the issues involved distinct and intelligible. It appears from your said statement that sixty-one miles of this road situate between Portage and Tomah were completed within the time prescribed by the statute of 1856—that another portion between Tomah and the St. Croix River or Lake was completed within the extended period prescribed by the act of Congress of May 5, 1864 (13 Stat. 66) and that the remaining portions of the road have been completed but not within the time prescribed by either of these statutes. It further appears from your statement that there was a deficiency in the lands in place along the *sixty-one* miles of road between Portage and Tomah, which piece of the road had been completed in full accordance with the provisions of the act of 1856; and that in satisfaction of such deficiency a duly appointed agent of the State had, on the 4th day of November, 1882, and on the 12th day of May, 1883, respectively, selected for the use and benefit of the Wisconsin Railroad Farm Mortgage Land Company other lands within the indemnity limits of the grant of 1856, but north of the St. Croix River or Lake.

By letter, dated November 28, 1885, addressed to the Secretary of the Interior, the governor of Wisconsin requested my approval of said selections. Upon my reference of said letter to you for action pursuant to the practice of the Department, you held (May 27, 1886) that said selections were unauthorized and illegal, and that they should be canceled.

The first question which presents itself is this: What right has the

state of Wisconsin acquired in respect to this land grant under these facts, to-wit, a seasonable completion of part of the road, and a complete construction of the remainder after the period prescribed? In your supplemental report of June 3, 1886, you inform me that this question has been settled by the decision of the supreme court of the United States in the case of *Schulenberg v. Harriman* (21 Wallace, 44); and that it was therein decided as to this very grant and including in part the identical lands now under consideration that "the lands granted have not reverted to the United States although the road was not constructed within the period prescribed, no action having been taken either by legislation or judicial proceeding to enforce a forfeiture of the grant."

Inasmuch then as after the lapse of twelve years from the rendition of that decision no forfeiture has been enforced by or under authority of Congress, the title of the state is unimpaired to the lands described in the grant and to indemnity within the limits withdrawn to make good the deficiency in place. These rights thus conferred upon the state of Wisconsin and thus enforced by the decision of the supreme court constitute the measure of your duty and mine with respect to these lands. What the statute confers the statute means to be enjoyed. What the statute directs it means to have done. Not to do it, or even to delay unnecessarily the doing of it, is to violate the statute, and involves a grave dereliction of duty.

The next question is whether the Farm Mortgage Company in whose behalf the State makes this application, is the legal successor of all the rights acquired by the State of Wisconsin in respect of the land earned by construction of the sixty-one miles of road between Portage and Tomah within the period and in accordance with all the conditions of the act of 1856. Your statement of the legislative enactments, both state and federal, and of the acts done thereunder, informs me that this question has been, in a proper case, directly passed upon by the circuit court of the United States for the western district of Wisconsin, which court you state decided that the Farm Mortgage Company is the legal successor of the State to all the lands inuring to said State by the construction of the road between Portage and Tomah.

The third and remaining question is this: If the general right of the state under the granting act is now unimpaired, and not to be questioned by this Department; and if the Farm Mortgage Company is the lawful successor thereto; then is the State entitled in behalf of such Company and as indemnity for the deficiency in the place sections opposite to said sixty-one miles in the Southern half of the 1856 grant, to certification of lands selected by it from the fifteen mile limits in the northern half of said grant? Upon that point you state that the said circuit court of the United States held in the case last referred to, that as the claim of the Wisconsin Railroad Farm Mortgage Land Company "related to road constructed under the act of 1856, prior to the passage

of the act of 1864, and not embraced or referred to in said act, it was competent for the State, in view of the action of Congress after accepting the act of 1864, but before conferring the grant made thereby upon the North Wisconsin and Chicago and Northern Pacific Air Line Railroad Company, to allow the Farm Mortgage Company to select the deficiency lands earned by its predecessor (the La Crosse & Milwaukee R. R. Co.) out of such lands north of St. Croix River or Lake, as were embraced within the indemnity limits of the grant of 1856."

You also state that the lands required to satisfy the claim of the Wisconsin Railroad Farm Mortgage Land Company were designated by a master of the circuit court, and were afterward duly selected by the agent appointed for that purpose by the Governor of the State.

I further learn from your said statement that my and your predecessors administered this grant, if not in the execution of, yet certainly in harmony with, said decision of the circuit court. The decision in *Schulenberg v. Harriman* to which you refer advises me that all the lands in place along the entire length of the grant and a considerable portion of the indemnity lands were certified to the State about twenty years since; and you further state that as late as 1870 about 40,000 additional acres of indemnity lands were similarly certified to the State for the use and benefit of the said Farm Mortgage Company.

You dissent from the said decision of the United States circuit court, and also from the uniform and concurrent action of the several Departments of the government, and express the opinion that the said decision, inasmuch as the United States is not a party to the case, does not determine the question under consideration. Holding the selection of the lands in question to be unauthorized and illegal you deny the governor's application and the list of selections is held for cancellation subject to appeal. To the reasons which you present for this dissent I have given the consideration which they merit. They do not in my view justify such a changed administration of this land grant as would reverse its entire previous history and as would contravene by this Department the decision of the federal court given under the circumstances attending this case. Whether binding upon the Department or not, in the sense you refer to, it is a decision of very high and persuasive authority. If the question were one of doubt, the safer rule of administrative action would lead me to accept it as authoritative in the conduct of executive business and to adhere to the practice heretofore and for so many years enforced. But in my view the case is free from doubt, and the decision of the said court rests upon sound and well established legal principles.

The case in 14th Court of Claims Reports, p. 125, to which you refer for the purpose of showing that the bestowment of these lands by the State on the Farm Mortgage Company was a diversion of the same from the purposes of the grant, seems to me to have no bearing upon the question pending between the State of Wisconsin and this Depart-

ment, except so far as it affirms the validity of the so-called diversion. Under such a grant of lands to a sovereign state as that of 1856, the application of them or their proceeds to the trust rests in the good faith of the State, and, in the absence of any express authority from Congress, this Department is powerless to control the discretion of the State as to the disposal of said lands.

In conclusion it appears from your statement that the existing right of the State of Wisconsin under the Congressional grants aforesaid is unimpaired by any Congressional declaration of a forfeiture or any judicial decree to that end, entered under the authority of a law of Congress; that with respect to the lands earned by construction within the period prescribed by and in accordance with all the conditions of the grant, the Wisconsin Farm Mortgage Company is the lawful successor of the State thereto; and that the uniform current of legislative, judicial and executive action for many years past has concurred in recognizing the right of the State to select for the use and benefit of said company lands of like class and character and locus as those embraced in the pending selection. In reaching this conclusion I have availed myself of the special consideration given to this subject by the Law Division of this Department, the results of which are embodied in the accompanying opinion of Mr. Vivian Brent, of that Division.

For the reasons therein more fully set forth, your decision is reversed, and you are directed to immediately submit for my approval in the customary form lists of selections made by the State of Wisconsin for the use and benefit of the Wisconsin Farm and Mortgage Company, and dated respectively November 4, 1882, and May 12, 1883, so far as said selections are within the indemnity limits of the said grant of 1856, as determined by the method of adjustment then prevailing in the land department, and nearest the tiers of granted lands along the line of the road north of the Saint Croix river; observing, in the execution of this order, the principles of this decision.

MINING CLAIM—PROTESTANT.

LUCY B. HUSSEY LODE.

A protestant is not entitled to the right of appeal.

A co-owner objecting to the issue of patent must protect his rights under the form of procedure provided for an adverse claimant.

Acting Secretary Muldrow to Commissioner Sparks, August 17, 1886.

I transmit herewith a letter from Hugh Butler, Esq., of Denver, Colorado, which is in the nature of a petition for certification of the papers in the matter of the protest of one Samuel M. Carleton, his client, against issue of patent for the Lucy B. Hussey Lode mining claim, Leadville, Colorado. The petition is not in the form required by the regulations,

not being under oath or accompanied by copies of the decisions alleged to be erroneous.

The petition sets out that your office dismissed Carleton's protest, and denied him the right of appeal; that prior to the expiration of the alleged time of appeal patent issued to the Wolcott Mining Company for said mining claim; and that said patent has not yet been delivered; wherefore it prays that I direct that the patent be withheld until the protestant's alleged rights in the premises are finally determined. Aside from the informality in the petition or any question as to the authority of the Department in the premises to grant the relief sought, if patent has actually issued as alleged, the petition must be denied on the facts stated therein. That a protestant is not entitled to the right of appeal is a well settled doctrine; *McGarrahan v. Cerro Bonito Quicksilver Mine* (S. M. D., 327); *Boston Hydraulic Gold Mining Co., v. Eagle Copper and Silver Mining Co.* (id. 320); *McGarrahan v. New Idria Mining Co.* (3 L. D., 422). But it is urged that because the protestant in this case claims the right of a co-owner in the said mine that he is entitled to be heard, though not alleging the status of an adverse claimant. In the *Grampian Lode* case (1 L. D., 555) it was expressly ruled that a co-owner must protect his rights under the form of procedure provided for an adverse claimant, and though the right of appeal was not considered in said case, such question is disposed of in the cases first cited.

The applicant must seek relief in the courts where ample remedy exists, if his interests have not been properly considered, for no case is now made out to warrant action on the part of the Department. The petition is therefore denied.

COMMUTATION—ACT OF MAY 14, 1880.

CLARK S. KATHAN.

By the third section of this act the right of the homesteader to initiate a claim by settlement is recognized, hence in case of commutation of entry, made under said act, the period of residence may be computed from settlement.

Acting Secretary Muldrow to Commissioner Sparks, August 20, 1886.

I have considered the case presented by the appeal of Clark S. Kathan from your office decision of November 10, 1884, rejecting the commutation proof tendered by him on homestead entry No. 9266, for lots 1 and 2 and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Section 18, T. 23, R. 12 W., Neligh district, Nebraska.

Kathan made homestead entry May 26, alleging settlement March 6, 1884. He submitted commutation proof September 20, 1884. The local officers rejected the same, on the ground "that there had been no cultivation of the land broken, and for the further reason that the improvements were too meager and insufficient to justify the issuing of a final certificate." Your office decision, however, holds that "the proof submitted shows that the improvements . . . are sufficient."

The question upon the point of sufficiency of proof (as is apparent upon a comparison of your office decision with that of the local officers) turns mainly upon the matter of cultivation. Kathan, having made his entry May 26, broke five acres of the tract that same year, but of course could raise no crop therefrom that season; and your office decides it unnecessary that he should have done so, citing in support thereof departmental decision in the case of John E. Tyrl (3 L. D., 49).

Your office, however, rejects Kathan's proof for another and entirely different reason, and one not alluded to by the local officers: to wit, on the ground that it was premature, having been made within less than six months from date of entry.

From your office decision Kathan appeals to the Department, claiming in substance:

1. That there is no statute requiring the lapse of six months after date of entry before commutation proof can be received;

2. That under the third section of the act of March 14, 1880, even if six months' settlement and cultivation as provided by the law granting pre-emption rights were to be insisted upon, the time specified should begin at date of *settlement*, and not at date of *entry*.

The right to commute a homestead entry is based entirely upon section 2301 of the Revised Statutes:

"Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section 2289 from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights."

This right may be exercised "at any time before the expiration of the five years," subject only to the condition of "making proof of settlement and cultivation as provided by the law granting pre-emption rights. Hence, the only limitation as to the time from which the right to commute begins—when considered with respect to the requirements in final proof—is to be found, if anywhere, in the regulations under the pre-emption law. There we find that, although the statute fixed no definite period within which the right to purchase may be established, the Department, under the authority of the pre-emption act, did prescribe six months as the term of residence which should be shown before final proof would be accepted.

As the residence thus required must of necessity be computed from *settlement*, on which the right of pre-emption is founded, or from some point of time subsequently thereto, so it was held that in commutation the time of residence should be computed from *entry*, on which the homestead right was founded prior to the act of May 14, 1880, (21 Stats., 140)." But under that act it was provided, in the 3d section:

"That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead

laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

So, after the passage of that act, the pre-emption settler and the homesteader were placed upon the same footing so far as the initiation of a claim by settlement is concerned and to that extent the homestead right was enlarged.

Therefore in commutation cases arising since the passage of said act and where the benefits thereof are claimed the purchaser is now entitled to have his term of residence computed from the time of settlement, "the same as if he had settled under the pre-emption law."

Under this construction, the term of residence will not be shortened, nor the quality of such residence be affected; for though it may begin from settlement, it must none the less cover a period of six months' actual residence; and by the performance of such condition the object of the regulation—assurance of good faith—will be as fully subserved as though the residence began from entry.

In the case at bar, the residence of the entryman having been continuous for six months from date of his *settlement*, and his improvements being deemed sufficient, his commutation proof will be accepted.

The decision of your office is therefore reversed.

HOMESTEAD CONTEST—SETTLEMENT—OCCUPANCY.

LEON *v.* GRIJALVA.

The decision of the General Land Office, rendered herein December 5, 1884, (3 L. D. 362) was affirmed by Secretary Lamar, August 21, 1886.

PATENT FOR LAND IN EXCESS OF PURCHASE.

EDWARD N. MARSH.

A patent erroneously issued for land in excess of the amount actually purchased, is no bar to the subsequent issue of patent to another for such excess.

If the amount of land embraced in a patent corresponds with the number of acres in a particular subdivision covered by said patent, quantity will determine the subdivision conveyed, though larger boundaries may be described.

The application and cash certificate were for the west half of the northwest quarter, "containing fifty-nine and fifty one hundredth's acres" and patent issued accordingly; but as said boundaries include ninety-nine and fifty-one hundredth's acres, it is held that said patent conveys only the northwest quarter of the northwest quarter, which contains fifty-nine and fifty-one hundredth's acres, and is no bar to the subsequent entry of another for the southwest quarter of said northwest quarter.

Acting Secretary Muldrow to Commissioner Sparks, August 21, 1886.

I have considered the appeal of Edward N. Marsh from the action of your office on April 20, 1885, holding for cancellation his homestead

entry for the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 3, T. 99, R. 35, Sioux City, Iowa, so far as the same is supposed to conflict with a patent issued September 20, 1870, to James C. Cusey, for the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of same section and town.

It appears that on July 14, 1870, said Cusey made application to the local office to purchase the "W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 3, T. 99, R. 35, containing 59.51 acres, according to the returns of the surveyor general." On said application the register certified "that the lot above described contains 59.51 acres, as mentioned above, and that the price agreed upon is one 25-100 dollars per acre." On the same day the register gave certificate that said Cusey had purchased said tract, describing it exactly as in the application and stating it to contain "fifty-nine and 51-100 (59.51) acres, at the rate of one dollar and twenty-five cents per acre, amounting to seventy-four dollars and thirty-nine cents, for which said James C. Cusey has made payment in full," etc. The next day, the receiver gave Cusey a receipt for "the sum of seventy-four dollars and thirty-nine cents, being in full for the west-half of north west quarter of Sec. 3, containing 59 acres and 51 hundredths at \$1.25 per acre."

On this certificate and payment patent was issued September 20, 1870, wherein it was recited in the usual form that, whereas said Cusey had deposited in the General Land Office the certificate of the register, etc., whereby it appeared that full payment had been made, etc., "for the west-half of the north west quarter" of said section and town, "containing fifty-nine acres and fifty-one hundredths of an acre, according to the official plat of survey of said lands, as returned to the General Land Office by the surveyor general, which said tract has been purchased by said Cusey," etc.

Afterwards, on March 18, 1873, Edward N. Marsh made homestead entry at the same office of the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of the same section and town, and on February 19, 1880, having made final proof of residence and improvements thereon received his final homestead certificate for said tract.

It does not appear from the records of the local or General Land Office that there was any conflict noted between this entry of Marsh and the purchase of Cusey, but when the papers in the homestead of the former were forwarded to your office for approval and patent, it was held there was a conflict between the two as to SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, and that inasmuch as said SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ was covered by the patent to Cusey, the homestead entry of Marsh was suspended, and by letter of February 5, 1885, you recommended to my predecessor, Secretary Teller, that the Attorney General be requested to bring suit to set aside the patent of Cusey as to said SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, it having been erroneously made to embrace said quarter. On April 5, 1880, Secretary Teller declined to act in the premises, for the reason that the statement contained in your office letter did not "furnish sufficient grounds on which to take intelligent action in the case." On receipt of the above your

office directed that the homestead entry of Marsh be held for cancellation to the extent of the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, because of conflict with the patent of Cusey. From this action Marsh appealed, and on said appeal the case is now before me.

After due consideration, I am of the opinion and direct that the judgment of your office be reversed, and the final proof of Marsh be examined and if satisfactory be approved and patent issued to him for the land described in his entry.

The error in the case is to be found in the ruling of your office that the patent to Cusey covered the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, when it only covered the fractional NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, embracing 59.51 of an acre, which was all he intended to purchase, all he paid for and all he did purchase, all for which he was entitled to a patent and all for which he received one. This is made plain by reading the patent in the light of the rules of construction properly applicable to such instruments. The patent referring to the certificate shows that Cusey bought and paid for but 59.51 acres, "according to the official plat of survey of said land returned," etc. Thus, the certificate and the official survey become as much a part of the patent as though they had been written therein in words and figures at length. And from the record thus made it is clear that the intention, the purchase and the patent coincide.

I am of the opinion that no title passed to Cusey for the entire west half of said quarter-section, but only to the northwest fractional quarter of said quarter. The fact that the patent describes his purchase as the west half of said quarter will not prevent the government from issuing to Marsh a patent for the land embraced in his homestead entry, it being apparent from the patent and the certificate upon which it is based that the land conveyed to Cusey was 59.51 acres—which, as shown by the government survey, is embraced within the limits of the fractional northwest quarter of said quarter.

The government plat of survey shows that the west half of said quarter contains 99.51 acres, and that the northwest quarter of said quarter contains 59.51 acres—being the exact number of acres described in the patent of Cusey as the amount of land purchased from the government.

Unless a different intention be clearly manifested, the general rule is that quantity must give way to metes and bounds; but that is because, generally, metes and bounds determine with greater accuracy the land intended to be conveyed. But where the land conveyed is within the limits of government surveys, which show with accuracy the amount of land contained in each division or subdivision, by which alone it can be sold or patented, and the amount of land embraced in the patent corresponds exactly with the number of acres of a particular subdivision embraced in the patent, quantity will then determine the subdivision conveyed, although larger boundaries may be described.

This principle was involved in the case of *Gazzam v. Phillips* (20 Howard, 372), which, I think conclusive of this case. That was an action of ejectment brought by Phillips, who claimed under Etheridge, against Gazzam, who claimed under Stone. The certificate of purchase and patent to Etheridge was for the *southwest* quarter of section 22, containing $92\frac{67}{100}$ acres. The certificate and patent to Stone was for the *southeast* subdivision of fractional section 22.

The southwest quarter of section 22 contained in fact 160 acres; but the court held that while "Etheridge under the pre-emption act of 1830 "was entitled to purchase the whole of the southwest quarter, and to "have it surveyed and patented to him, yet it was not so surveyed, nor "did he purchase, nor has he obtained a patent for the same. On the "contrary, he purchased and paid for the west subdivision only, containing 92 acres, and took out patent for the subdivision."

It will be seen that the patent purports to convey the southwest quarter, and that quarter contains 160 acres; yet the court say that his patent is only for a fractional part of that section, containing 92 acres. Hence they limited his patent to the number of acres purchased, which were embraced in a subdivision of that section shown by the lines of survey.

As Cusey only purchased and paid for 59.51 acres embraced in a legal subdivision shown by the government survey, his patent cannot be held to convey to him a greater quantity by reason of the fact that the patent describes the land conveyed as the west half of said quarter—which, as shown by the government survey, contains 99.51 acres.

I am therefore of opinion that patent may issue to Marsh for the land embraced in his homestead entry, if the proof submitted be approved.

PRACTICE; CALIFORNIA SWAMP LANDS.

STATE OF CALIFORNIA *v.* MARTIN.

Notice of a motion for review or rehearing must be given within the time allowed for filing such motion.

Rule 82 of Practice is designed to prevent the transmittal of an appeal which the Commissioner may consider defective, but the Department is not concluded if the Commissioner does not act thereunder.

One who alleges settlement before survey and the non-swampy character of the land involved is a party in interest, and entitled to notice of appeal from an order of the General Land Office directing an investigation into the character of the land.

The return of the surveyor-general under the first clause of section 2488 R. S. is a final adjudication as to the lands thus shown to be swamp and overflowed, and can only be impeached on the ground of fraud or mistake in its procurement.

Secretary Lamar to Commissioner Sparks, August 21, 1886.

The State of California has filed a motion for review of my decision of April 29th last, rendered in the above stated case.

This decision dismissed the appeal of the State upon two grounds: (1) Because no notice of said appeal was served on the opposite party; and (2) Because the appeal is from a decision denying an application for review, which, being a matter interlocutory in its nature, is not appealable.

The Rules of Practice provide that motions for rehearing and review may be allowed after notice to the opposite party, and, except when made on the ground of newly discovered evidence, must be filed within thirty days from notice of decision.

In the absence of any special provision as to the time within which notice must be served, the Department has ruled that notice of a motion for review should be given within the time allowed for filing such motion. Rule 86, relating to appeals, provides that appeals from the Commissioner's decision must be filed in the General Land Office *and served on the appellee, or his counsel within sixty days* from date of service of notice of such decision. A similar construction applies to rules for review. See *Conk v. Rechenbach*, (4 L. D., 106).

Counsel insist that Martin was not a party in interest, and therefore not entitled to notice of appeal; and that if he was so entitled, and the appeal was defective for want of such service, that under Rule 82 they are entitled to notice of such defect, and to fifteen days in which to amend. Martin claimed settlement on the tract prior to survey, and alleged that the land was not swamp but dry and fit for cultivation. He was therefore a party in interest, and entitled to service of notice.

Rule 82 is only designed to prevent the transmittal of an appeal which the Commissioner may consider defective. *Stevens v. Robinson* (4 L. D., 551). But the Department is not concluded, if the Commissioner does not act thereunder. The failure to serve Martin with notice of appeal or of motion for review was sufficient ground for dismissal and the decision will not be disturbed. But the right of the State cannot be affected by this refusal, if by the appropriate action directed by your office Martin fails to show that he had a valid claim to the land at the date of survey, and that it is in fact dry and not swamp land, or if it is not alleged and proven that the return of the surveyor general was procured by fraud or mistake.

Section 2488, Revised Statutes, provides that: "It shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed lands all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States."

In the case of *Central Pacific Railroad v. State of California* (2 C. L. L., 1052) Secretary Schurz, construing this section, held that: "This clause secures to California all lands which the surveyor general officially reports to be swampy, whether they are so or not." This ruling

was adhered to by the Department in the case of *State of California v. United States*, 3 L. D., 521. It is therefore a settled rule of the Department that under section 2488 the return of the surveyor general is a final adjudication of the question as to the character of lands granted to the State as swamp and overflowed, and such decision cannot be disturbed by any action of your office upon a mere allegation or showing that the return of the surveyor general is incorrect. The mere fact that the report of the special agent shows that the land returned by the surveyor general, and represented upon the township plat as "*swamp and overflowed*," is not of that character, would not authorize a refusal to certify or patent said lands to the State. Admitting the correctness of the report of the special agent, it simply shows that the return of the surveyor general was the result of an error of judgment, and his return cannot be impeached upon this ground alone.

The adjudication and decision of the surveyor general upon the question of the swampy character of land under section 2488 has the same binding force and effect of any other final judgment, and can only be impeached or set aside upon the ground of fraud or mistake in its procurement.

Such a decision, however, is not conclusive of the rights of bona-fide settlers, who had a valid claim of right to the land prior to the date of approval by the surveyor general of the plat of survey, provided it is not swamp land. Therefore if any settler alleges a valid claim to said land, initiated prior to and existing at the date of approval of survey, and that said land is not swamp and overflowed, he would be entitled to a hearing to determine these questions, as his rights cannot be prejudiced by the action of the surveyor general, or the Commissioner, in a matter to which he was not a party and had no opportunity of being heard.

This rule is applicable in all cases, whether under the general law, or under the special law applicable to California, the only difference in the application of the rule being that under the general law the approval of the Secretary is the final adjudication of the character of the land, while under the special law applicable to California it is the approval of the township plats by the surveyor general that determines the character of the land.

Without passing on the rights of either party to this case, I have deemed it advisable, in view of the questions presented by the record, to call your attention to settled construction of section 2488, Revised Statutes, and other rulings of the Department, as above stated, to govern you in the action directed by your office in this matter.

MILLE LAC INDIAN LANDS—SWAMP GRANT.

STATE OF MINNESOTA.

Since the act of Congress approved July 4, 1884, the Department has no authority to dispose of lands acquired from the Mille Lac Indians by treaty of May 7, 1864.

Secretary Lamar to Commissioner Sparks, August 21, 1886.

I am in receipt of your office letter of May 20, 1885, transmitting the appeal of the State of Minnesota from your office decision of March 9, 1885, holding for rejection the claim of said State, under the swamp land grant, to certain described lands located in Townships 42 N., Ranges 25, 26, and 27 West of the 4th principal meridian, Taylor's Falls district, Minnesota.

The lands referred to are within the limits of the reservation for the Mille Lac Indians, made under treaty of February 22, 1855, (10 Stat., 1166,) which was ceded to the United States May 7, 1864. (13 Stat., 695.)

The act of March 12, 1860, (12 Stat., 3,) extending to Minnesota the provisions of the swamp land grant of September 28, 1850, (9 Stat., 519,) contains the following proviso:

The grant hereby made shall not include any lands which the government of the United States may have sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of said act.

The State of Minnesota, however, lays claim to the lands in controversy, *not* under said act of March 12, 1860, but under Section 2490 of the Revised Statutes—the provision and exception in that section which is pertinent to the case in hand being as follows:

Provided, That the grant shall not include any lands which the government of the United States may have *sold or disposed of* under any law enacted prior to March 12, 1860.

In brief, the State claims that the land in controversy, not having been “sold or disposed of” under any law enacted prior to March 12, 1860, by virtue of Section 2490, of the Revised Statutes, passed to the State, notwithstanding their prior “reservation”—the word “reserved” being omitted when the act of March 12, 1860, came to be embodied into the Revised Statutes.

A discussion and construction of Section 2490, R. S., demanded by the State, is uncalled for in connection with this case. The Indian appropriation bill, approved July 4, 1884 (23 Stat., 89) provides that the lands acquired from the Mille Lac Indians, by treaty of May 7, 1864, proclaimed March 20, 1865, (13 Stat., 693) “shall not be patented or disposed of in any manner until further legislation by Congress.”

No further legislation upon the subject having since been had by Congress, this Department has no authority to patent or in any manner dispose of any of the lands described, whether swamp or otherwise.

For the reasons herein given, your office decision is affirmed.

FORT REYNOLDS MILITARY RESERVATION.

SAMUEL ALDRED.

Under the act of June 19, 1874, the lands in question, with the buildings thereon, were offered for sale after due appraisalment, but subsequently, and prior to sale, the buildings were destroyed. *Held*, that said act authorizes the sale of the land at its appraised value.

Secretary Lamar to Commissioner Sparks, August 21, 1886.

I have examined the papers forwarded by your letter of August 11th instant, relative to the status of the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 11, T. 21 S., R. 62 W., in the old Fort Reynolds Military Reservation, Pueblo land district, Colorado.

The matter was first brought to the attention of the Department by your office letter of February 27, 1885, which stated that one Samuel Aldred had applied to purchase the tract above described. His application was refused by the local office, because he declined to pay, in addition to the price of the land, the sum of \$315 for certain buildings, which had been appraised thereon at the value named. He then appealed to your office. His reason for refusing to pay for the buildings was that they had been destroyed and removed, and that the tract was at the date of his application without any buildings whatever.

Without acting upon the appeal, your office reported the matter to the Department for instructions as to what course should be pursued, in view of the facts alleged.

The appraisalment was authorized by the act of June 19, 1874 (18 Stat., 85), and had fixed \$315 as the value of the houses, stables and corrals, which were upon the tract.

July 15, 1885,* the case was remanded to your office with instructions to ascertain with certainty the facts as to the alleged destruction and disappearance of the buildings, and to act on the appeal as involving a matter properly within your jurisdiction, under the authority given you by law for the disposal of the public lands.

Your office thereupon rejected Aldred's application to purchase, and he has not appealed. Under your direction, the local office proceeded to investigate as to the facts relative to the destruction of the buildings, and made report to the effect that said buildings had been utterly destroyed and taken away. Said report is based upon affidavits, which accompany it, of certain parties who have known the land since 1872, and upon extended investigation in the way of inquiry of many persons acquainted with the reservation. It concludes with the recommendation that the tract remain open for sale without requiring the purchaser thereof to pay the sum of \$315, as the appraised value of buildings which do not now exist. In this recommendation you concur, and ask that

* 4 L. D., 25.

the papers be returned with the necessary authority for your further action.

It would certainly be a great hardship to require of the purchaser of land also payment for buildings which had once been thereon, but which through decay and depredation, resulting from the want of the protection and care necessary to their preservation, had disappeared. There can be no doubt of the authority in such case to dispose of the land under the provisions of the act of June 19, 1874, waiving any requirements which formerly existed by reason of the appraisement of the buildings, but which have ceased to exist, because said buildings are no longer there. I concur in your recommendation, and you will dispose of the land in question as if there had never been any buildings thereon.

COMPLIANCE WITH THE LAW NOT SUSPENDED BY CONTEST.

BYRNE v. DORWARD.

Until final decision in a contest the entry-man whose claim is attacked should continue to comply with the law, and if he fails so to do his entry will be liable to attack should he successfully defend in the pending suit.

Secretary Lamar to Commissioner Sparks, August 24, 1886.

I have considered the case of Patrick Byrne v. William W. Dorward, on appeal by the last named from your decision of February 19, 1886, holding for cancellation his timber-culture entry, No. 53, made May 22, 1878, upon the NW. $\frac{1}{4}$ of Sec. 6, T. 138 N., R. 79 W., Bismarck, Dakota Territory.

Byrne initiated contest against said entry January 19, 1885, charging failure to break or plow at any time prior thereto the five acres required by law to be broken during the second year after date of entry; that at no time prior to the initiation of said contest had the land been cultivated as required by law, nor had any trees, tree-seeds or cuttings been planted thereon; that there is not now, nor has there been, any trees or cuttings growing thereon, and no part of the land is under cultivation in any manner whatever. A hearing was ordered and duly had on the above charges, both parties being represented by counsel. A motion was made by contestee to dismiss the contest, on the ground that his right under his entry had been determined in his favor by a decision of the Department, rendered January 3, 1885, in the case of Meserve against this contestee. This motion was denied, and the case was then submitted on an agreed statement of fact, wherein it was admitted by contestee "that since May 21, 1880, no improvements whatever have been made upon the tract by or in the interest of said claimant." Upon the presentation thus made, the register and receiver recommended the cancellation of Dorward's entry.

That action was affirmed by your office decision, the appeal from which is now before me.

The reason offered by appellant for not continuing his improvements by the planting and cultivation of trees, seeds or cuttings is, that so long as the question as to the validity of his entry was pending and undetermined, he did not regard himself as required to proceed with his improvements. His contention is that he should be allowed a reasonable time after decision in his favor within which to resume cultivation as required by the law. You very properly held that such position could not be sustained.

There can be no doubt of the correctness of the position that pending a final decision in a contest on whatever ground or charge, the entryman whose claim is attacked should continue to comply with the law, and that if he fail to do this he lays himself liable to attack in a subsequent contest should he successfully defend in the one pending. To hold differently would be to condone laches and to open the door to a practice which would enable parties, under the guise of a contest, to hold lands indefinitely without complying with the requirements of law under which their entries were made.

The decision appealed from is affirmed.

HOMESTEAD—ACT OF JUNE 15, 1880.

LEITNER v. HODGE.

Through mistake in description the land entered and patented was not that upon which the entryman settled and resided. *Held*, that the act of June 15, 1880, does not authorize the purchase of the tract thus entered, on the surrender of the patent, but that patent should issue for the homestead claim as defined by settlement and residence.

Acting Secretary Muldrow to Commissioner Sparks, August 28, 1886.

I have considered the case of John D. Leitner v. Stephen Hodge, involving the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 30, T. 14 S., R. 22 E., Gainesville, Florida, on appeal by Leitner from your decision of April 1, 1885, awarding the land to Hodge.

It appears from the record before me that in 1868 Hodge, who is an illiterate man, procured "a surveyor to run the lines and give him a correct description of the land which he desired to enter as a homestead," which land was the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of the section above mentioned. The surveyor gave him the wrong numbers, however, to wit, those of the two quarter-quarters involved in this contest, and on May 7, 1868, he mistakenly made homestead entry thereof, because, as he states, "he relied fully upon said surveyor for the correct numbers." At this time, it appears, both of these tracts—that which Hodge's entry covered and that which he intended to enter—were vacant public land.

Hodge did not settle on or claim the tract in contest, but settled and resided on and improved the other tract until date of his final proof in 1874; and, as he was still in ignorance of the correct description of his homestead, his final proof and entry designated the tract in contest, and patent therefor issued to him on July 1, 1875. Thereafter Hodge continued to reside on and claim the tract upon which he originally settled until January 28, 1884, when he quit-claimed to the United States all his right, title and interest in the land patented, and shortly afterwards filed his patent in your office, accompanied by a petition requesting its cancellation, and that he might be permitted to purchase said patented land under the act of June 15, 1880. This petition your predecessor granted on March 17, 1884, and Hodge made cash entry for said land on the 28th of the same month.

On May 15, 1884, the local officers transmitted to your office the application of John D. Leitner to have Hodge's patent canceled and his (Leitner's) right as a pre-emption settler on the land recognized. The date on which this application was filed does not appear, but it was executed March 12, 1884. Leitner alleged in it that he had been in possession of the land, and that it was improved to the value of \$2500, either by him or those from whom he bought the possessory right. On June 22, 1884, your predecessor ordered a hearing to ascertain the truth of Leitner's allegations, meanwhile suspending Hodge's cash entry. Said action was taken because, as the decision states, Hodge's cash entry was allowed in ignorance of Leitner's settlement and improvements, and because Hodge could have had adequate relief by amendment. Hearing was duly had, and Leitner substantially established his allegations and showed that Hodge had never had any possession of or claim to the land in controversy. Whereupon your office made the decision appealed from, awarding the land to Hodge.

I cannot agree with said decision. In my judgment the act of June 15, 1880, does not apply to such a case as Hodge's. It was designed to remedy a defective title under an entry, and thus to grant the homesteader relief. But here there was no need of such a relief. Hodge's covering the land in controversy by an entry was caused by a mere mistake of description; it was a simple clerical error, which he himself, or any one desiring to settle thereon, might have had corrected. Indeed, in neither law nor equity did he ever make an entry of the land in controversy, for he never intended to enter it. His entry was legally of the land which he actually settled on, and he was not within the purview of the act of June 15, 1880, because he required no relief under it. Said act manifestly contemplates the purchase of the tract which the settler had intended to acquire by the entry, and not of a tract which he never did intend to acquire. Much less does it contemplate the right of a settler on one tract of land to seize the possession and improvements of a settler on another, by taking advantage of a cler-

ical error. The act was intended to grant a relief, and not to license a robbery.

I concur in the view of your predecessor, above referred to, that when Hodge surrendered his patent for cancellation he was entitled to a patent for the land upon which he had actually settled and where he had resided for ten or more years. The homestead entry of one Schoeflin, which it appears was then of record, and which Hodge erroneously thought was a bar to amendment by him, was in fact no bar, for his equitable right to the land was protected by his patent. Said entry has since been canceled, I believe; but, if not, it should be canceled. No other person could or can acquire title to said land against him, for it had been fully earned by his residence and cultivation, and the government now holds the legal title solely for his benefit. You will please direct that a new patent issue to Hodge for the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said section, cancel his cash entry erroneously made under the act of June 15, 1880, and allow Leitner to make pre-emption claim to the land in controversy.

Your said decision is reversed.

RAILROAD GRANT—DEFINITE LOCATION.

FLORIDA RY. AND NAVIGATION CO.

The map showing the definite location of the road between Waldo and Tampa Bay was filed in 1860, but returned by the General Land Office for the Governor's certificate and when refiled the time allowed for the completion of the road had expired, but it appearing that the map so refiled was identical with the original map, which properly showed the location of the road, Secretary Schurz held that the right of the road was protected under the original map, and such decision is binding upon succeeding heads of the Department.

The final adjustment of the grant however will be deferred for the disposition of pending Congressional action with reference thereto.

Secretary Lamar to Commissioner Sparks, August 30, 1886.

On December 3, 1885, Hon. Wilkinson Call addressed a communication to the Department, requesting that the subject of the reservation of lands granted to the State of Florida, under the act of May 17, 1876, for the construction of a road from Amelia Island to Tampa Bay and Cedar Keys, be reconsidered.

This letter was referred to your office for report thereon, which you have submitted, concurring in the request of Senator Call, and recommend that the withdrawal of lands for the benefit of said road, ordered by the decision of Secretary Schurz of January 28, 1881, be revoked.

The Florida Railway and Navigation Company now appear and resist the granting of said motion, and ask the Department to proceed with the execution of said decision.

The act of May 17, 1856, granted to the State of Florida, for the purpose of constructing the road aforesaid, six sections per mile on each side of said road, prescribing the manner in which the State might dispose of said lands, and providing that if said road or branch is not completed within ten years, no further sales shall be made and the lands unsold shall revert to the United States. The benefit of this grant was conferred by the State of Florida upon the Florida Railway Company, whose rights and interest thereunder have been assigned and transferred through its successors to the Florida Railway and Navigation Company. The road was completed from Fernandino *via* Waldo to Cedar Keys in 1860, and lands inuring for that portion of the road were certified to the State in 1858 and 1860, a map of definite location for such portion having been filed and accepted as the basis of the adjustment of the grant.

A map of the remaining portion of the main line between Waldo and Tampa Bay (which is the portion now in controversy) was filed in your office December 14, 1860, by M. L. Smith, chief engineer of the Florida Railroad Company, but not having the certificate of the governor under the seal of the State, it was returned to him to have that omission supplied. Nine years after the expiration of the time for the completion of the road, to wit, December 7, 1875, the president of the road presented a map of definite location of the road from Waldo to Tampa Bay for file in the Land Office, and asked that the lands be listed to the road covered thereby. This map was shown to be identical with the map filed in 1860, and the Commissioner of the General Land Office recommended that it be accepted as a map of definite location, and that lands be withdrawn in accordance therewith for the purposes of the grant.

Secretary Chandler declined to receive or approve this map, holding that the act definitely locating the road should be done within the time fixed for the completion of the road, and that a failure to discharge this duty should be taken as conclusive evidence of the abandonment of the grant. This map was therefore returned to the president of the road, with the information that the Department could not permit the company, after so great a delay, to file a map designating the route of its road. Subsequently, to wit, October, 1879, the company again presented this map to your office, with accompanying exhibits, showing that a map of definite location of the line between Waldo and Tampa had been filed in the General Land Office December 14, 1860, and that the map then filed is identically and exactly the line delineated upon said map filed December 14, 1860. Accompanying this was also an application for a review of the subject, alleging that the decision of Secretary Chandler rested upon a mistaken understanding of the facts, to wit: that no map of definite location had been filed within the time required for a completion of the road, and asking leave to place the matter before the Department, with a view of displaying the facts as they actually exist.

This application was addressed to the Commissioner of the General Land Office, from which it appears that he considered it not so much in the nature of a review of Secretary Chandler's decision, as of an original application for the enforcement of their rights under the grant in view—their then existing status which they proposed to show. The Commissioner therefore, in passing upon the question, said:

"After full and careful examination of the files and records of this office, and the *proofs presented*, I find no room for doubt that the line of route of the road in question was actually surveyed, and a map of such survey intended as evidence of the definite location of the line, filed in the General Land Office on December 14, 1860; and that it was prepared and presented in good faith. If said map was properly executed—sufficient in itself, needing no certificate by the governor—the action of this office in returning it to Captain Smith, resulting in its loss, should not be made to work a forfeiture of the company's right, it being admitted that the grant has not been forfeited by failure in other respects."

But in view of the decision of Secretary Chandler, holding that the act of definitely locating the road must be done in all cases before the expiration of the time fixed for completing the road, and as the entire question was apparently presented for a review or reconsideration of the former action of the Department, he declined to express an opinion as to the sufficiency of the map as originally filed, or of the reproduced copy of the same as then presented, and submitted the matter to the Secretary without recommendation.

Secretary Schurz, on January 28, 1881, considering this application as a motion for review of his predecessor's decision, entertained jurisdiction of the question, upon the ground that material facts that show the authority of the company to locate its line and file the map were not before his predecessor, and held that the approval or certificate of the governor was not essential to the validity of the survey; that the map fixing the definite location of the road in 1860 was filed in the General Land Office, which exactly corresponded with the *duplicate* now filed, and there remains now no doubt that the line exhibited was then surveyed and marked as the definite location of the road, and as such recognized by the company and State authorities. In accordance therewith he directed a withdrawal of the lands to protect the rights of the company and to secure a proper adjustment of the grant upon the line designated.

I am now asked to review this decision and to revoke the order of withdrawal made thereby, applicants urging in support of said motion that if Secretary Schurz had the authority to review the decision of Secretary Chandler, his decision may with equal authority be reviewed and revoked by any succeeding Secretary. In view of the facts of this case, I am unable to see the force of this argument. The question before Secretary Chandler, and which he alone decided, was, whether a map of definite location can be filed after the expiration of the time allowed for completing the road. It is clearly shown by the record of the

case then made. that the Secretary did not contemplate that any map of definite location had theretofore been filed, but that the map presented was an original filing, because, referring to this part of the road, he says:

"No map showing the definite location of the road to Tampa Bay has ever been filed in the Department," and "The company now offers to file a map definitely fixing that portion of the road last mentioned," etc.

The question decided by Secretary Schurz was, whether a duplicate map of definite location of that part of the road may be received and filed after the expiration of the time allowed for the completion of the road, and a withdrawal made thereunder upon proof that the duplicate presented is a correct copy of the original which was filed in time, and that the original has been lost or destroyed.

If, in fact, a map of definite location had been filed in time, the title of the grantee by virtue of that act was completed by attaching it to specific lands, and the decision of Secretary Chandler, that a map of definite location could not be filed after the expiration of the time required for completion of the road could not affect such right, unless in such decision he had directly passed upon the sufficiency of the original filing. That he did not pass upon the question of the sufficiency of any map prior to the expiration of the time, and that no such question was before him, but on the contrary that he considered that the company was for the first time offering to file its map is evident.

Therefore whether we consider the question presented to Secretary Schurz in the light of an original application under a different claim of right, or as a motion for review upon the ground of newly discovered evidence, in either case Secretary Schurz, under the facts presented, had a right to entertain jurisdiction of the subject. This decision was concurred in by Secretary Teller by his action of January 30, 1884,* in directing the certification of the lists for his approval, holding, upon the authority of the decision of Secretary Schurz, that the map of 1860 was valid and sufficient to fix and locate definitely the line of the road.

I am therefore of the opinion that the decision of Secretary Schurz upon that issue is binding upon his successors, and should not be disturbed.

But another question is presented for my consideration in this case, to wit: that the forfeiture of this grant is now pending before Congress, a committee of the House having made a report in favor of such forfeiture. It is urged by the counsel for the road that the Senate having failed to act upon the matter and the House having failed to take any action upon the report of the Committee, that the duty of the Department is to proceed to enforce and execute the rights of the grantees under the law.

It is also represented to me by the governor of the State of Florida that the citizens of that State are greatly interested in the completion

*Atlantic, Gulf and West India Transit R. R. Co., 2 L. D., 561.

of this road, and that it is a matter of great importance to the State of Florida and her people, but in view of the fact that the road by failure to complete its line within the time required by law has rendered its grant liable to forfeiture, and Congress having indicated its intention to take action thereon, and this motion being presented and urged by a Senator from that State, is a sufficient reason why I should withhold all action thereon until the determination of Congress in the matter.

It is true that Congress may never take such action, but that furnishes no sufficient reason why this Department should proceed with the execution of the grant while Congress is considering the question of its forfeiture.

I refuse to revoke the order of withdrawal made by Secretary Schurz, because that withdrawal became effective by the filing of the map of definite location, which he decided had been properly filed in time, and no act of the Department can affect or impair the right of the company, but while the rights accruing by virtue of such filing and withdrawal cannot be impaired by any action of the Department, the execution of such rights may be suspended by the Department.

This was the course pursued by my predecessor Secretary Teller, who while recognizing all the rights of the Company acquired by virtue of the filing of map of definite location, as determined by Secretary Schurz, and the withdrawal thereunder, decided that:

"In view, however, of the fact that the time has expired within which the railroad in question was to have been completed, and that legislation is pending in the present session of Congress relating thereto, you will take no action in the matter until further direction."

I can see no material difference in the status of the company now from what it was then, and I therefore direct that you will take no action in this matter, as to the disposition of the lands covered by the line of definite location of this road and embraced within the terms of the grant, until further ordered.

PRACTICE—APPEAL—SPECIFICATION OF ERRORS.

STEVENS v. ROBINSON.

The supervisory and directory authority of the Secretary of the Interior will not be exercised in disregard of the rules of practice where they prescribe a plain and adequate course of action and are not in conflict with the law.

Rules 88 and 90 of Practice must be construed together and are mandatory in character.

Under said rules the time within which the specification of errors should be filed is essential, and a failure to file within the prescribed period works a forfeiture of the right of appeal.

Acting Secretary Muldrow to Commissioner Sparks, August 31, 1886.

In the case of Frank L. Stevens *v.* Alfred B. Robinson, involving the SE. $\frac{1}{4}$ of Sec. 2, T. 94 N., R. 60 W., Yankton, Dakota Territory, decided

by me June 5th last (4 L. D., 551), a motion for review and reconsideration has been filed on behalf of Stevens.

The material facts to be considered in the case, so far as is necessary for the purpose of this review, are as follows: The decision of your office from which an appeal was brought to this Department was rendered December 1, 1884, and notice thereof given to the resident attorneys the same day. The appeal was not filed in the local office until February 5, and the specification of errors was not filed until May 16, 1885. June 25, Robinson by his attorney filed a motion to dismiss the appeal because the specification of errors had not been filed within the time allowed for an appeal as required by Rules 88 and 90 of Practice. Upon this state of facts, I ruled that the motion to dismiss the appeal was well taken, and accordingly the appeal was dismissed. My decision stated that the appeal itself was not filed in time; and certainly the record, as before me then, showed such to be the case. That point, however, was not taken advantage of and the appeal itself was treated as having been filed in time, as it really was, as now appears, under the rule laid down by the Department in the case of *King v. Leitensdorfer* (2 L. D., 374).

The motion now before me sets up four grounds of error in my said decision of June 5th last, to wit:

"1st. Error in not holding that the omission to file a formal specification of errors in the decision of the Commissioner of the General Land Office had been supplied for at least forty days prior to the presentation of the motion to dismiss the appeal.

"2d. Error in not holding that the said formal assignment of errors having been filed prior to the motion to dismiss the appeal, said motion came too late.

"3d. Error in holding that in the presence of a motion to dismiss, filed forty days after the assignment of errors had been filed, the Secretary of the Interior was precluded by the Rules of Practice from entertaining the appeal.

"4th. Error in granting the motion to dismiss the appeal, and in not deciding the case upon its merits as presented by the appeal."

That is to say, the real gist of the motion before me, and of the argument filed in support of it, is based upon the ground that Rules 88 and 90 are merely *directory*, and not *imperative*; and that, therefore, by virtue of the supervisory power with which he is invested, the Secretary of the Interior may waive them at any time he may desire to do so.

The rules of practice were adopted to subserve the public interests and for the good of the practice in the transaction of business; and so long as they exist they have in effect the force of a statute. *Parker v. Castle*—on review (4 L. D., 84). And although it is quite true that none of them "shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law," it is also equally true, that where they are not in conflict with the law, and have prescribed a plain and adequate course of action, they are to be followed, for there then is no occasion for invoking the Secretary's directory and supervisory powers.

Premising this much as to the object and nature of the rules of practice in general, I shall examine more particularly the two (88 and 90) that are brought directly under consideration by this motion for review.

Rule 88 provides: "Within the time allowed for giving notice of appeal, the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains."

Rule 90: "A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed."

The distinction between statutes that are merely directory and those that are imperative or mandatory is not always clearly discernible. But a safe and general rule, which has the sanction of the courts of England and of this country, is: That whether a statute is mandatory or not, depends upon whether the thing directed to be done is the essence of the thing required. Another general rule is: A statute that prescribes a penalty for the failure to do a certain thing in a *specified time* is mandatory: for therein *time* is of the essence of the thing required to be done. Upon this question, on page 334, Maxwell on "Interpretation of Statutes," it is said:

"In general then, it seems that where a statute confers a privilege or a power, the regulative provisions which it imposes on its acquisition or exercise are essential and imperative So, if the liberty of appealing from a decision is given, subject to the fulfilment of certain conditions, such as giving notice of appeal and entering into recognizances, or transmitting documents within a certain time, a strict compliance with these provisions would be imperative, and non-compliance fatal to the right of appeal."

In the light of these well established rules of law, I am decidedly of the opinion that the two rules of practice now under consideration when construed in *pari materia* as must be done, are mandatory, and not merely directory. The time within which the specification of errors is to be filed is of the essence of the thing to be done; and there is a penalty affixed by rule 90 for a failure to file within that specified time, to wit: That the right of appeal is waived and lost.

Counsel for Stevens refer to, and rely upon, the cases of *School District of Ashley v. Hall* (106 U. S., 428), and *Gumbel v. Pitkin* (113 id., 545), to sustain their position that these rules already referred to are to be considered as directory merely. But their position is untenable. In these two cases the court was construing Section 997 of the U. S. Revised Statutes, which provides that: "There shall be annexed to, and returned with any writ of error for the removal of a cause, at the day and place therein mentioned an assignment of errors with a citation to the adverse party;" and the court in passing upon a motion to dismiss a writ of error because of non-compliance with the statute just quoted, in the first case (which is cited with approval in the second), say:

"A failure to annex to or return with the writ of error an assignment

of errors, as required by Section 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of paragraph 4, Rule 21, it will ordinarily be enough."

This rule of the supreme court required the appellant, at least six days before the case was called for argument, to file a brief containing an assignment of the error relied upon.

Now if rule 88 stood alone, there might be some reason for holding that it is merely directory, as the court did with reference to the section of the statutes just quoted; but being taken together with rule 90 such construction can not be allowed to obtain. It is rule 90 as well as rule 88 that has not been complied with. And the United States supreme court, in cases where the statute, and also its rule above mentioned, have not been complied with, have invariably dismissed the writ of error. *Portland Co. v. United States* (15 Wall., 1); and *Treat & Dickerson v. Jamison* (20 id., 652).

It is also again insisted in the argument filed with the motion before me, that the notice of appeal originally filed in this case was in itself a sufficient specification of errors in the decision of your office. This point was very fully considered by me when my decision of June 5th last was rendered, and was decided to be not well taken; and I do not deem it well to say more now on the subject, further than that I am of opinion that my conclusion then arrived at was a correct interpretation of the law and the practice.

After a very careful examination of all the questions presented for my consideration, I deny the said motion, and transmit herewith the papers for the files of your office.

REPAYMENT—LIMITED BY STATUTE.

HEIRS OF ISAAC W. TALKINGTON.

The authority of the Department to make repayments is limited by statute and does not cover a case where the purchase price of land has been twice paid to the government.

Acting Secretary Muldrow to Commissioner Sparks, August 31, 1886.

I have considered the appeal of the heirs of Isaac W. Talkington from your decision of February 11, 1885, refusing the repayment of \$200 alleged to have been paid by said Talkington in commuting Dardanelle, Arkansas, homestead entry, No. 3886, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 21, T. 71 N., R. 18 W.

Talkington made entry for said tract February 15, 1870, and in April, 1874, died. Subsequently thereto, to wit, January 4, 1884, the heirs purchased said tract under the second section of the act of June 15, 1880, pursuant to the departmental decision of October 22, 1883 (2 L. D., 46).

In the present application certain affidavits set forth that on August 20, 1872, Talkington commuted said homestead entry to cash entry,

paying for the land the sum of \$200, and in support of such assertion a paper is produced purporting to be duplicate receipt No. 7419, dated Dardanelle, Arkansas, August 20, 1872 in favor of Isaac W. Talkington, and signed by John C. Austin, receiver, for \$200 in full for said tract, and across the face of which is written, "commuted from Hd. No. 3886, dated February 14, 1870." The heirs now ask for the return of said \$200.

On the other hand, the records of your office fail to show that said cash entry was made, and the receipt of said \$200 was never reported by the local officers; indeed, the returns show that cash receipt No. 7419 was issued to another person in September 1872 for a different tract of land. Thus the fact of such payment in the present state of the case is involved in some doubt. The application can however be disposed of. The power of repayment by the Secretary of the Interior is limited and defined by statute. Section 2362 of the Revised Statutes provides that:

"The Secretary of the Interior is authorized upon proof being made to his satisfaction, that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated."

The act of June 16, 1880 (21 Stat., 287), makes further provision for repayment in certain cases. Section 2 provides that, "in all cases where homestead or timber-culture or desert land entries, or other entries of public lands have been heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed," the amount of purchase money, fees, and commissions may be repaid.

This being all the law applicable to repayment in such and like cases, I am of opinion, even admitting the fact of payment, that this Department is not vested by law with authority to make repayment in this case.

For this reason said decision is affirmed.

CONTESTANTS PREFERENCE RIGHT—ACT OF JUNE 15, 1880.

HOLLANTS *v.* SULLIVAN.

Failure to assert the preference right of entry within the statutory period after cancellation deprives the successful contestant of all rights gained by the contest, and he cannot thereafter be heard as a party in interest to object to the subsequent purchase of the land under the act of June 15, 1880.

The right of purchase under said act is not affected by reason of the original homestead affidavit having been illegally made before a clerk of court.

Acting Secretary Muldrow to Commissioner Sparks, August 31, 1886.

I have considered the case of William Hollants *v.* Michael Sullivan, involving the SE. $\frac{1}{4}$ of Sec. 10, T. 104 N., R. 54 W., 5th P. M., Mitchell,

Dakota, (Sioux Falls series,) on appeal from your office decision of February 16, 1885, adverse to Hollants.

The record shows the following facts: May 11, 1880, Sullivan made homestead entry of the tract described. October 25, 1882, Hollants commenced contest against said entry, charging failure to settle upon and improve the tract as required by law. Hearing was set for January 12, 1883, notice of which was given by publication and by registered letter sent to claimant's last known address.

Claimant was not present, nor was he represented at the hearing. On the affidavit of contestant, corroborated by two witnesses, setting forth that Sullivan had not cultivated, built or resided upon, or in any way improved the tract since the date of entry, the register and receiver adjudged the entry forfeited. Said judgment was rendered on the day of the hearing, to wit, January 12, 1883, and no appeal was taken therefrom. September 14, 1883, your office, in the regular course of business, and following the judgment of the local office, canceled said entry upon the records. In August, 1883, however, Sullivan had applied to purchase under the act of June 15, 1880, and on the 18th of the same month he was allowed to purchase, and final cash certificate was issued to him by the local office.

June 24, 1884, Hollants filed in the local office his application to have Sullivan's said cash entry canceled, and at the same time applied to enter the tract, he alleging that about June 1, 1883, he went upon the land and made *bona fide* improvements; that he had broken twenty-three acres of the land, and had continued to occupy the same.

June 28, 1884, said application was forwarded to your office, which, on the 6th of September, 1884, held Sullivan's purchase under the act of June 15, 1880, valid, and rejected Hollants' application to enter. Hollants did not appeal.

September 30, 1884, your office, apparently on its own motion, reconsidered and rescinded its decision made as above, and held that as Sullivan had failed to appeal from the judgment of forfeiture rendered by the register and receiver, in the contest brought by Hollants, that judgment became final and vested in contestant a preference right of entry under the act of May 14, 1880. Sullivan's homestead and cash entry were therefore held for cancellation, and the preferred right of entry was awarded to Hollants.

The register and receiver reported that the parties were notified October 7, 1884, of the decision last above mentioned, but that the notice to Sullivan was returned unopened.

Thereupon Hollants again on the 24th of October, 1884, applied to make homestead entry of the tract. His application was on the same day granted and he entered the land under the homestead law.

February 16, 1885, your office again, on its own motion, so far as the record shows, reconsidered the case, and came to the conclusion that

Sullivan had the superior right, and was entitled to purchase under the act of June 15, 1880.

Your predecessor therefore set aside your office decision of September 30, 1884, and reinstated that of September 6, 1884. The effect of this was to cancel Hollants' homestead entry and award to Sullivan the right of purchase, which, as has been stated, he had availed himself of. It is from this action that Hollants appeals.

Recurring to such of the facts presented by the foregoing recital as are necessary to a decision of the case, we find (1) that Hollants, as a successful contestant, failed to avail himself of his preferred right of entry under Section two of the act of May 14, 1880, and (2) that Sullivan after the expiration of said preferred right and prior to the cancellation of his entry on the records of your office, applied and was allowed to purchase under the act of June 15, 1880. Hollants not only permitted the time during which the law gave him a preferred right of entry to elapse, but he waited until June 14, 1884, nine months after the cancellation of Sullivan's entry on the records of your office, and ten months after Sullivan's purchase under the act of June 15, 1880, before making a move in the direction of claiming the tract. He then asked that Sullivan's purchase be set aside and that he be allowed to enter.

Your office very properly by its first decision, that of September 6, 1884, in the case, held Sullivan's purchase valid and rejected Hollants' application. Under the rulings and decisions of the Department in force at that time, Sullivan had a right at any time pending the contest to purchase under the provisions of section two of the act of June 15, 1880, and thus as against the contestant as well as the rest of the world could secure title to the tract in contest.

This interpretation has recently been changed in the case of *Freise v. Hobson* (4 L. D., 580), but such change does not affect rights which were acquired and which as in this case became vested under previous rulings and decisions. But the former ruling under which Sullivan was allowed to purchase does Hollants no harm, for, under any construction or interpretation of the law, it deprives him of no statutory right. Not having asserted his preferred right as a successful contestant, he at the end of thirty days after notice of cancellation occupied a position with reference to his right to enter in no way superior to that of any other person qualified to enter. His rights were then, so far as his contest was concerned, simply on a par with those of others who might desire to claim the land.

This being true, he could not at the date when he asked for the cancellation of Sullivan's cash entry make his demand as a party in interest, for he had waived whatever statutory right he might otherwise have claimed, by his failure to assert it in time. The question as to Sullivan's rights under his purchase therefore becomes one solely between him and the government, and, as before stated, his right to pur-

chase as he did was indisputable under the rulings and decisions governing your office and the Department at that time.

It is objected, however, by appellant that the affidavit made by Sullivan when he made his homestead entry was not in accordance with law; that therefore his homestead entry was illegal and void, and that no right of purchase under the act of June 15, 1880, could be predicated upon such an entry. The ground of objection to the affidavit is that it was made before a clerk of court, under Section 2294 of the Revised Statutes, whereas it could not legally be so made, for the reason that neither Sullivan nor any member of his family were then residing on the land.

Admitting the fact to be as charged, such irregularity could be cured by the filing of a properly executed affidavit, and would not render the entry void, but only voidable; and said entry being on its face valid, segregated and appropriated the land covered thereby, so long as it remained of record: *Graham v. Hastings & Dakota Ry. Co.* (1 L. D., 380); *St. Paul, Minneapolis & Manitoba R. R. Co. v. Forseth* (3 L. D., 446.)

The case consequently comes clearly within the purview of the act of June 15, 1880, so as to authorize Sullivan's purchase thereunder. It was long held by your office, and that view has been sustained by the Department (see case of *George W. Maughan*, 1 L. D., 53), that purchase may be made under section two of the act of June 15, 1880, although the homestead entry was void at inception. I do not stop here to consider the correctness of the view thus enunciated, for it is not necessary to this case, but refer to it to show the extent to which the Department has gone in administering the act of June 15, 1880.

Your office decision awarding the tract in question to Sullivan under his purchase is affirmed.

SETTLEMENT RIGHTS—ACT OF MAY 14, 1880.

DANIELL v. DANFORTH.

A pre-emptor and homesteader with conflicting claims having agreed to certain mutual concessions for the purpose of terminating the controversy, it was competent for the pre-emptor to abandon his claim as such and take the land as a homestead, and he would in such case be entitled to the benefit of his settlement as provided in the act of May 14, 1880, to the exclusion of intervening claims.

Acting Secretary Muldrow to Commissioner Sparks, August 31, 1886.

I have considered the case of *Arthur Daniell v. C. A. Danforth*, involving lots 3 and 4 of Sec. 1, T. 20 N., R. 2 E., Olympia, W. T., on appeal by Daniell from your predecessor's decision of December 13, 1884, sustaining the decision of the local officers which rejected his application to file a pre-emption claim for said land.

The facts material to the issue raised by the appeal are as follows.

In 1882 said Danforth endeavored to file as a pre-emption settler for lots 3 and 4 and the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section, but his application was rejected because of the superior right of the Northern Pacific Railroad Company. At the same time one Eaton was claiming all of said tracts under the timber and stone act, and one Paxton was claiming them (by a later application) as a homestead settler, both claims having been rejected, however, because of the railroad grant. At a hearing ordered in 1883, the Railroad Company and Eaton defaulted and thenceforward were dropped from the case. Danforth and Paxton appeared and offered testimony, and the local officers decided February 7, 1884, that the applications of both should be allowed, "and the priority of the respective claims determined when they or either of them made final proof." No appeal from said decision was taken, and its effect was to place both Danforth and Paxton of record as claiming the land, the former by a pre-emption filing and the latter by a homestead entry, from date of their respective applications in 1882. At date of said decision, also, both parties had valuable improvements thereon, Danforth's being wholly on the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of the section. To avoid further litigation, it appears, Danforth and Paxton made an agreement to divide the land between them, and in pursuance thereof they appeared at the local office on March 28, 1884; Danforth filed a relinquishment of his claim to the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and Paxton filed a relinquishment of his claim to lots 3 and 4; and Danforth made homestead entry of said lots, and Paxton made homestead entry of said quarter-quarter.

This was the status of the land when on June 23, 1884, Daniell applied to file a declaratory statement on lots 3 and 4, alleging settlement on the 24th of the preceding March. Said application was rejected by the local officers, and Daniell appealed, the ground of his appeal being that, as Danforth had no improvements on lots 3 and 4, and had abandoned his pre-emption claim by making an original homestead entry, his right thereunder to said lots attached March 28, 1884; and that as he (Daniell) had settled on said lots on the 24th of said month, his right thereto was superior to Danforth's, and his filing should have been received. Your office overruled the appeal, however, and sustained the rejection as aforesaid; and on February 18, 1885, a motion for reconsideration was denied.

I entirely concur in said action of your office. It is clear from the recital of facts above that, by virtue of the decision of February 14, 1884, the tract in controversy was covered by a subsisting pre-emption and homestead claim on March 24, the date whereon Daniell alleges settlement, and thereafter until March 28, and that therefore no valid settlement on it could then be made, and no right or claim to it could thus be initiated. The issue in relation to the land until said March 28 was solely between Danforth and Paxton, and if Danforth was not entitled to it the Land Department would have awarded it to Paxton. The two interested parties, however, agreed to divide the land between them and

thus terminate litigation; and that such a disposition of the controversy was lawful and should be encouraged by the government is clear, and was so ruled in the case of *Ayers v. Buell and Connelly* (2 L. D., 257). In so doing, it was entirely competent, I think, for Danforth to abandon his pre-emption claim, and initiate a new claim under the homestead law. This he did, and he at once became entitled to the benefit of his settlement for three months prior to date of his homestead entry. This alone would be sufficient to cut off Daniell's claim by virtue of a settlement within said three months. And Danforth has since notified the Land Department that he proposes to claim the benefit of said three months' settlement.

For those reasons I concur in the action of your office rejecting Daniell's application, and affirm said decision.

I find from the papers before me that Daniell alleges that he has asked for a hearing, for the purpose of showing that Danforth did not make said homestead entry in good faith but for speculative purposes, and that your office has not yet acted upon it. This was assigned as a ground of reconsideration of your said decision, and also as error in this appeal. Said assignments are not well taken, for the reason that the issue before you, and properly here under the appeal, arose upon an alleged priority of right. I think, however, that this allegation should be inquired into, and that you should order a hearing for that purpose. Said hearing should properly embrace the good faith of Danforth at and from the date of his homestead entry on Lots 3 and 4, and under his present application Daniell should be treated as a protestant. There are certain facts already in the record bearing upon this charge, but they have not been presented in such manner as to justify the Land Department in passing on them.

DESERT LAND ENTRY—FINAL PROOF.

GEORGE RAMSEY.

The fact of reclamation may be shown on final proof without showing the results of reclamation.

If it be shown that a sufficient permanent supply of water to effectually irrigate the land has been secured, the proof should be deemed satisfactory without requiring proof of crops raised as the result of irrigation.

It should appear however that the whole tract for which final proof is submitted has been actually irrigated in a manner indicative of good faith, and in this connection the quantity of water, the right to its use, and the manner of its distribution should be duly considered.

Secretary Lamar to Commissioner Sparks, September 1, 1886.

By letter "C" of May 10, 1886, you transmitted the appeal of George Ramsey from your decision of October 12, 1885, rejecting his final proof on desert land entry of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 8, T.

24 N., R. 64 W., made May 13, 1885, at the Cheyenne land office, Wyoming Territory.

From the records in the case it appears that on the 13th of August, 1885, the local officers transmitted for instructions the said final proof of Ramsey, together with his relinquishment of the S. $\frac{1}{2}$ of said SE. $\frac{1}{4}$, they thinking that they had no authority to receive final proof for a part of a desert land entry, even when accompanied by a relinquishment of the remaining part.

Your decision herein appealed from was thereupon rendered, by which the said entry was canceled to the extent of the relinquishment, the final proof for the remainder was rejected and returned to the local office. This decision ruled that before final proof upon desert land entries can be accepted, it must be shown that agricultural crops have been raised on the land reclaimed. Upon this point you say:

"I shall require evidence that the law has been complied with in form and spirit. I do not think the fact that crops can be raised is established until it is shown that crops have been raised; and it must also be shown that the raising of the crop is the result of a reclamation without which the crop could not have been raised."

The appeal urges that upon this point your decision is in direct opposition to the instructions of my immediate predecessor upon the same point.

The desert land act (19 Stat., 377) provides: that any qualified person, "upon the payment of twenty-five cents per acre, may file a declaration, under oath, that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within the period of three years thereafter." And that "at any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land *in the manner aforesaid*, and upon the payment to the receiver of the additional sum of \$1.00 per acre, for a tract of land not exceeding six hundred and forty acres, to any one person, a patent for the same shall be issued to him."

This act has been the subject of construction by the Department more than once, and the several conclusions arrived at have not been uniform. Within a few days after the passage of the act, to wit, March 12, 1877, your office issued a circular of instructions for guidance in carrying its provisions into effect. (2 C. L. L., 1375.) Therein it was said: "At any time within three years after the date of filing the declaration and the issue of certificate, the proper party may make satisfactory proof of having conducted water upon the land applied for."

These instructions continued in force until they were supplemented by those of September 3, 1880 (ib., 1882). Therein it was held: First, That the whole tract must be, in fact, irrigated in a manner suitable for cultivation, and indicative of the good faith of the claimant. And second, That an agricultural crop of cereals, vegetables, or hay, must be raised within the statutory period of three years.

The same question was discussed incidentally in the case of *Wallace v. Boyce*, (1 L. D., 54,) although that case turned upon a different question, viz: That the claimant had not conveyed water upon the land to any extent whatever; and the only thing therein decided was that the intendment of the statute was to provide for the reclamation of desert lands to an agricultural state, that Congress had specified water as a means to that end, and that there should be sufficient water to prepare the land for cultivation.

This case was commented upon and explained by my immediate predecessor in his instructions before mentioned (3 L. D., 385), which was the last time, so far as I am aware, that this question has been before this Department until the present. This was on the 9th of February, 1885; and the ruling then adopted was that "The proof is satisfactory when it shows the claimant to be the owner of a sufficient quantity of water to irrigate the land sufficiently for agricultural purposes, and that he has conveyed such water on the lands, so that it can be used in irrigating the crop."

Now, by the terms of the act, the land is to be reclaimed "by conducting water upon the same." The first question to be determined is, the significance of the word "reclaim" as it is used in the act. In the interpretation of statutes the rule is that, "Words are generally used in their usual and most known signification." (1 Blackstone, 50.) Hence, applying the general meaning to the word "reclaim," as given by Webster, and the meaning of the statute is: That the desert lands shall be reduced to an agricultural state "by conducting water upon the same." It does not follow, however, that an agricultural crop must be raised in order to show that such a condition has been arrived at. In other words, it is not necessary to show the *results* of reclamation in order to prove the *fact* of reclamation. And under the statute the *fact* of reclamation is all that need be proven. The reason is this: It is a well known fact that the soil of the desert lands that are affected by this act under consideration, has all the elements to make it productive except water. If it has, then the *fact* that it has been supplied with a sufficient permanent supply of water is all that can be required under the statute. If it has not, then it can not be reclaimed "by conducting water upon the same," and the object of the statute is defeated. As was said by Mr. Secretary Teller (3 L. D., 386): "The raising of a crop may be evidence of reclamation, but it is not the only evidence that ought to be received, and ought not at any time to dispense with actual proof as to the character of the ditch, quantity of water, etc., owned by the claimant." But I will go one step further than my predecessor, and hold that the whole tract for which proof is offered, (unless it be possibly some high points or uneven surfaces which are practically not susceptible of irrigation,) must be *actually irrigated* in a manner indicative of the good faith of the claimant. In this connection the right to

the water used, the quantity of it, the manner of its distribution, and the permanency of the supply are all to be taken into consideration.

This view of the subject is confirmed, I think, by an examination of the debates in Congress when the act was passed. There was little or no discussion of the original bill in the House, where it originated; but in the Senate it was discussed at considerable length. In the report of the Senate Committee on Public Lands accompanying the bill, I find the following language: "The bill provides for the sale of a section of land to any person who will first *irrigate* the same at the usual price of \$1.25 per acre." And again, "But the Committee believe that when these lands are *irrigated* they will be of sufficient value to enable the purchaser to pay the government price paid for other public lands." And in the discussion over the bill, Senator Sargent, of California, who had charge of the bill, in answer to certain interrogatories as to the manner of irrigation, the amount of water required, etc., said:

"Now we propose by this bill that the parties shall have a right to have an exclusive right to buy the land for three years, provided they in good faith start to bring water upon the land, and do bring the water to the land; and when they have brought enough water there to make it an object for people to occupy the land These lands yield richly, provided they can get the water A person can not live there unless he has irrigation." See Congressional Record, 44th Congress, 2d Sess., Vol. 5, Part 3. Pages 1964-1974.

There is nothing to be observed in these debates which indicates in the slightest that Congress ever intended that the claimant under this act should in any case be required to show the results of reclamation before his final proof should be accepted. It was considered sufficient that proper irrigation be proven.

With reference to the particular proof of Ramsey, I have to say that in my opinion it conforms to the rule above adopted. It is therein testified to by two witnesses, who appear to be in a condition to testify understandingly, and from personal observation of the land, that there is one large main ditch four feet wide in the bottom and two feet deep, running through each legal subdivision of the tract in controversy; that there is a plentiful supply of water thus obtained, which is spread over the entire tract by "tapping" this main ditch; that there has been a sufficient amount conducted upon, and distributed over, the land to render it productive. And the claimant is one of an association that owns this ditch, and has an absolute ownership of sufficient water to irrigate this land properly, thus insuring the permanence of the supply. No crops have as yet been raised upon the land, but one of the witnesses states that, "it is now (July 13, 1885) under cultivation."

Entertaining the views that I do, upon this question, I reverse your decision.

HOMESTEAD—ADJOINING FARM ENTRY.

THOMAS B. HARTZELL.

The right to make an adjoining farm entry cannot be invoked for the purpose of securing one hundred and sixty acres to one who "owns" a less amount which was entered under the general homestead law.

Contemporaneous and uniform executive construction should be regarded as conclusive where there is doubt as to the exact intendment of a statute.

Acting Secretary Muldrow to Commissioner Sparks, September 3, 1886.

I have considered the appeal of Thomas B. Hartzell from your decision of May 21, 1885, rejecting his application to make an adjoining farm entry of certain tracts of land in the Los Angeles, California, district.

It appears that Hartzell, on November 9, 1883, made homestead entry of the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 18, T. 14 S., R. 1. W., S. B. M., in said land district, on which entry final certificate was issued December 21, 1883. On April 13, 1885, said Hartzell made application to be allowed to make "an adjoining farm entry" of the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 7, and the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 17, same town and range. This application was rejected by the local officers and on appeal the rejection was affirmed by you.

Claimant states that at the time he made his homestead entry in 1883 the land he now seeks as an "adjoining farm entry" was within the withdrawal for the benefit of the Texas Pacific Railroad Company, and he was thereby prevented from entering the same; but that, with the consent of that Company, and the expectation of procuring title from it, he improved and cultivated the land; and inasmuch as said railroad grant has been forfeited and he can not procure title from said company for the land, he makes the present application.

I have caused the records of your office to be examined, and they show that the land now sought to be entered was never within the withdrawal for the said railroad company, and hence was subject to entry at the time of the original homestead entry of Hartzell was made in 1883.

You reject his present application on the ground that in making entry in 1883 he exhausted his homestead right. In this it is strenuously insisted by counsel that you erred.

The first section of the act of May 20, 1862, conferring the general homestead right, also contained the provision under which the right to make an adjoining farm entry is claimed. These provisions are embodied in Section 2289 of the Revised Statutes, and the clause relating to the adjoining entry states that, "Every person owning or residing on land may under the provisions of this section enter other land contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

In relation to the general homestead right, granted by the act of May 20, 1862, it was said by Acting Secretary Muldrow, in the case of Hiram E. Thornton, 3 L. D., on page 511:

"That act (of May 20, 1862,) provided that any one qualified should 'be entitled to enter one quarter section or a less quantity' of unappropriated public land. It is to be observed that here is no expressed restriction upon the right of entry, so far as the numbers thereof are concerned, but there is the emphatic declaration that the party should be 'entitled' to make entry to the extent of one quarter section and no more. Yet the Department, viewing the context of the whole act, construed the above general provision, as to the right of entry, to mean that but one entry could be made, whether for a whole quarter section or less. This rule, established shortly after the passage of that act, has been adhered to consistently and persistently ever since."

In harmony with this rule, the Department has uniformly held that the land "owned" by a party seeking to make an adjoining farm entry must be "owned" otherwise than under the homestead law, for the simple reason that to hold otherwise would be to give to such party more than one homestead right under said act. See cases of *Savage v. Weymouth*, and *ex parte W. C. Thomas*, (12 C. L. O., 120-1). This contemporaneous and uniform executive construction is not to be disregarded, but should have the same force and effect as the statute itself. *Brown v. United States* (113 U. S., 568).

Congress, by implication, recognizing and acquiescing in the above construction of the homestead law, has by statutory enactments established some exceptions to the general rule. The first of these, found in Section 2306 of the Revised Statutes, is the result of legislation in 1872 and 1873, and makes an exception in favor of those who were in the military or naval service of the United States. It does not appear that Hartzell was in such service and he cannot avail himself of said section. The next exceptions are made by the acts of March 3, and July 1, 1879 (20 & 21 Stats., pp. 472 and 48, respectively). These two acts provide in substance that where a person has taken a homestead within the limits of any railroad grant, and was by existing law restricted to eighty acres, he might enter, under the homestead laws, an additional eighty acres, adjoining the original entry. But the provisions of these acts cannot be invoked to aid Hartzell's case, because (1) the land embraced in his original homestead entry, as shown by the records of your office, was not within railroad limits: nor (2) was he at the time of said entry restricted by existing law to the entry of only eighty acres: and (3) said acts only apply to such persons as had "taken a homestead," and not to those who might thereafter take such homestead, as did Hartzell in 1883, four years after the passage of the acts.

On May 6, 1886, Congress passed another act in relation to this subject, making therein no new exception to the general rule, but only dispensing with cost of patent and with proof of settlement and cultiva-

tion on the additional entries allowed under the two acts of 1879, provided the entryman had made final proof of settlement and cultivation under the original entry.

I therefore find no error in your said decision and affirm the same.

COAL LAND—PROOF AS TO THE MINERAL CHARACTER OF LAND.

COMMISSIONERS OF KINGS COUNTY *v.* ALEXANDER ET AL.

The proof of the mineral character of land must be specific and based upon the actual production of mineral.

It is not enough to show that adjoining lands are of mineral character, but it must be shown as a present fact that the lands are mineral.

Secretary Lamar to Commissioner Sparks, September 4, 1886.

I have considered the case of the Commissioners of Kings County, Washington Territory, *v.* William J. Alexander, Joseph Thiel, Charles A. Berger, John Geehan and Alexander Laird, as presented by the appeal of the former from the decision of your office, dated October 3, 1884, sustaining several coal entries made by said entrymen.

The record shows that Alexander made coal entry No. 61 of Lot 5, N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 16, T. 24 N., R. 4 E., on April 6, 1883; that Joseph Thiel made coal entry No. 62 of Lots 1, 2 and W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 16, T. 25 N., R. 4 E., on April 7th, same year; Charles A. Berger made coal entry No. 63 of Lots 4, 5, 6 and NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 16, same township and range, on April 7, 1883; that John Geehan made coal entry No. 64 of Lot 3, Sec. 16, same township and range, on April 9, 1883, and that Alexander C. Laird made coal entry No. 65 of Lots 3, 4 and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 16, T. 24 N., R. 4 E., Olympia land district, W. T.

The above entries were made under Section 2347 of the Revised Statutes. The lands covered by said entries are in Section 16 of townships 24 and 25, range 4 east. Allegations having been filed by said Commissioners that said lands are reserved for school purposes; that they are of great value on account of their proximity to the City of Seattle, and that they are not mineral land, your office on December 21, 1883, directed the local land officers to order a hearing to determine the character of the land, whether mineral or not.

February 20, 1884, was set for the hearing, at which all parties in interest appeared by counsel and offered testimony. On April 3, 1884, the district officers transmitted the testimony without rendering any opinion thereon. Your office, however, on October 3, 1884, considered the evidence and found that the weight of the testimony, as to the dip, strike and angle of inclination of the surrounding veins, mines and cropings, together with the invariable similarity of the incasing strata to that discovered by the shaft, established that the coal deposit extended

under the lands in question, and that they should be classed as coal lands; and held that said entries should remain intact.

The record is exceedingly bulky, much of the testimony offered is irrelevant, and the opinions of some of the witnesses claiming to be experts are in direct conflict. The testimony shows that, although one shaft has been sunk ninety feet deep, no coal has been found upon said lands. Indeed, counsel for the entrymen concede this fact, but contend that the preponderance of the testimony shows that the coal measures extend under these lands, and therefore their coal character is established so as to render them subject to entry under said Section 2347.

It is clear that if said lands are not mineral, they are not subject to entry under said section. It is true that the entrymen have made affidavit, among other things, that they are well acquainted with the character of the land applied for and with each and every legal subdivision thereof, having frequently passed over the same; that their knowledge is such as to enable them to testify understandingly with regard thereto; that said lands contain large deposits of coal, and are chiefly valuable therefor, but it nowhere appears from the testimony of the witnesses that any coal has been actually found upon the lands covered by said entries.

The lands are in close proximity to the city of Seattle and the evidence shows that they are valuable by reason thereof. It is a significant fact that not one of the entrymen appeared at the hearing and gave testimony concerning the character of the land, or their means of knowledge by which they were enabled to make the affidavits above referred to. Aside from the testimony offered by the protestants, the evidence submitted by the counsel for the entrymen shows that their opinion is based upon a mere theory that coal will be found, if the shaft is sunk deep enough. But it has been repeatedly held by this Department that the proof of the mineral character of land must be specific and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from actual production of mineral and not from a theory that the lands may hereafter produce it. *Hooper v. Ferguson* (2 L. D., 712); *Dughi v. Harkins* (ibid., 721); *Roberts v. Jepson* (4 L. D., 60); *Cleghorn v. Bird* (ibid., 478); *Lientz et al. v. Victor et al.* (17 Cal., 272); *Alford v. Barnum et al.* (45 Cal., 482).

Since the evidence shows that said land is not mineral in character, it will be unnecessary to consider the question whether the reservation for school purposes for the benefit of said Territory withdraws from mineral entry those lands in school sections not known to be mineral at the date of the filing of the township plat thereof in the local land office. While it is true that if the lands applied for are clearly mineral

in character, the mere fact of their close proximity to a city would be no reason for refusing an entry under the mining laws, yet the fact of the increased value of such lands, by reason of their location, may account for an attempt to acquire title to the same under the mining laws, when their mineral character is not shown.

After a careful examination of the record, it is evident that said entries were not made in accordance with law.

Said decision of your office is accordingly reversed, and you will please cause said entries to be canceled.

HOMESTEAD—ADDITIONAL ENTRY—ACT OF MAY 6, 1886.

CIRCULAR.

Commissioner Sparks to registers and receivers, July 26, 1886.

Your attention is called to the following act of Congress and instructions thereunder:

AN ACT to protect homestead settlers within railway limits and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all homestead settlers on public lands within the railway limits restricted to less than one hundred and sixty acres of land, who have heretofore made or may hereafter make the additional entry allowed either by the act approved March third eighteen hundred and seventy-nine, or the act approved July first eighteen hundred and seventy-nine, after having made final proof of settlement and cultivation under the original entry, shall be entitled to have the lands covered by the additional entry patented without any further cost or proof of settlement and cultivation.

Approved May 6, 1886.

1. The acts of March 3 and July 1, 1879, provide that homestead settlers who make *additional* or *new* homestead entries under authority thereof, are required to reside upon and cultivate the land embraced in such additional or new entries for at least one year.

2. The present act dispenses with the requirements of residence and cultivation upon and of the tracts embraced in *additional* entries made under the former acts. Such *additional* entries can be made only upon tracts "adjoining the land embraced in the original entry."

3. The requirement of residence and cultivation is *not* dispensed with in respect to *new* entries made under the acts of March 3 and July 1, 1879.

4. In order to entitle a homestead entryman to an additional entry under the act of March 3 or July 1, 1879, and to a patent for such additional entry under this act, his original entry must be a valid, *bona fide* entry, and the proofs presented in support thereof must be accepted by this Office.

5. You will, therefore, in no case issue a final certificate on the additional entry until you have been advised by this Office that final proof

on the original entry has been approved and the additional entry allowed. When so advised you will issue final certificate on the additional entry without cost to the entryman, and forward the same to this Office.

6. Form 4-197, with necessary alterations, may be used for final certificates under this act.

Approved:

L. Q. C. LAMAR,

Secretary.

TIMBER CUTTING ON THE PUBLIC DOMAIN.

CIRCULAR.*

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 5, 1886.

By virtue of the power vested in the Secretary of the Interior by the 1st section of the act of June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes," the following rules and regulations are hereby prescribed:

1st. The act applies only to the States of Colorado and Nevada, and to the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana, and other mineral districts of the United States not specially provided for.

2d. The land from which timber is felled or removed under the provisions of the act, must be known to be of a strictly mineral character and that it is "not subject to entry under existing laws of the United States, except for mineral entry."

3d. No person, not a citizen, or *bona fide* resident of a State, Territory, or other mineral district, provided for in said act, is permitted to fell or remove timber from mineral lands therein. And no person, firm, or corporation felling or removing timber under this act shall sell or dispose of the same, or the lumber manufactured therefrom, to any other than citizens and *bona fide* residents of the State or Territory where such timber is cut, nor for any other purpose than for the legitimate use of said purchaser for the purposes mentioned in said act.

4th. Every owner or manager of a saw-mill, or other person felling or removing timber under the provisions of this act, shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable

* For previous circulars on this subject see 1 L. D., 601-3; 4 id. 521; 10 C. L. O., 136 *et seq.*; 12 id. 126.

if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the State or Territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use and for the purposes aforesaid.

5th. The books, files and records of all mill-men or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this Department.

6th. Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes, within the State or Territory where it grew.

All cutting of such timber for use outside of the State or Territory where the same is cut, and all removals thereof outside of the State or Territory where it is cut, are forbidden.

7th. No person will be permitted to fell or remove any growing trees of any kind whatsoever, less than eight inches in diameter.

8th. Persons felling or removing timber from public mineral lands of the United States must utilize all of each tree cut that can be profitably used, and must cut and remove the tops and brush, or dispose of the same in such manner as to prevent the spread of forest fires. The act under which these rules and regulations were prescribed provides as follows:

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

9th. These rules and regulations shall take effect September 1, 1886, and all existing rules and regulations heretofore prescribed under said act, inconsistent herewith, are hereby revoked.

WM. A. J. SPARKS,
Commissioner.

Approved, *August.*

L. Q. C. LAMAR,

Secretary.

MINING CLAIM—SUIT TO VACATE PATENT.

ROBERT HAWKE.

Failure to comply with local regulations may be shown by protest or adverse claim, but does not afford ground for judicial proceeding against the patentee by the government where no conflict with the general law appears.

Secretary Lamar to Commissioner Sparks, September 6, 1886.

I have considered the application of D. H. Vaughn and others of Deadwood, Dakota, for the institution of a suit by the United States to vacate patent No. 5312, issued January 31, 1882, to Robert Hawke, upon Placer Mineral Entry No. 8, Whitewood mining district, Lawrence County, Dakota.

The ground of said application is fraud by Hawke in procuring issue of the patent, in that he procured it for the purpose of acquiring the houses and other improvements of occupants of the land, in that he failed to comply with the law in respect of expenditure on the claim, in that he failed to comply with the local mining regulations in making his location, and in that the land is not and never was valuable for minerals. These charges are said to be supported by a number of affidavits which accompany the application.

The report of your office, now before me, shows that this patent is based upon a relocation made by said Hawke on September 12, 1877. The claim is within the limits of the town site of Deadwood, and several protests were duly filed against it, alleging the non-mineral character of the land, which were disposed of by the decision of the Department rendered December 19, 1881, in the case of Townsite of Deadwood (8 C. L. O., 153), affirming the decision of your office (Id., 18). Said case arose upon protests filed by the townsite occupants against various mineral claimants, including Robert Hawke. Hearing was ordered upon the question of the character of the land, at which some eighteen hundred pages of testimony were submitted, and on said testimony certain of the mining claims were held to be valuable for minerals, among others the claim now in question, and patent accordingly issued to Hawke. All the tracts thus found to be mineral were ordered to be segregated from the townsite entry, and townsite patent will issue, as I am informed, excluding said tracts by metes and bounds.

In respect to the charge that Hawke procured the patent in order to acquire the improvements of the townsite occupants, it rests upon the allegation that certain persons, being or claiming to be agents or co-owners with Hawke, have been endeavoring to persuade these occupants to purchase said improvements from Hawke. If the land was mineral, as it was decided to be, the case of *Deffebach v. Hawke* (115 U. S., 392, 407) holds that the townsite settlers were on it without legal or equitable right, and were not even entitled to compensation for their

improvements under local statutes. Obviously, therefore, the United States are under no obligation, on the above allegation, to protect such settlers by the institution of the suit prayed for.

In regard to the amount of work done on this claim, there is an allegation that it did not amount to one hundred dollars; but said allegation is entirely too general, in the face of the record upon which patent issued, to warrant a suit to set it aside.

The charge of non-compliance with the local mining regulations rests upon the allegation that Hawke has embraced in his claim "a strip of land 821 feet in length up and down Whitewood Gulch," and has extended its side lines beyond "what is known as the second rim rock." The copy of said mining regulations on file provides as follows: "All claims shall consist of 300 feet running up and down the general course of said creek, and include first and second rim rock." From an inspection of the plats, it appears that Hawke's claim is not more than 300 feet in length along Whitewood creek, and it does not appear that this does not satisfy the regulation. Nor does it satisfactorily appear that said mining regulation limits the width of the claim to the second rim rock. But, conceding the alleged non-compliance, it is evident that the mining regulations were made, and are recognized by the United States, for the protection of miners; and if any mineral claimant was injured by Hawke's location, it became his duty to file an adverse claim or protest in the local land office pending consideration of the application for patent. Neither of these courses was taken, and, since the tract embraced in the claim is in extent within the limit allowed by the laws of the United States, and has been paid for at the legal rate, I fail to see that the United States have been injured, or have any sufficient ground in this charge for proceeding judicially against the patentee.

Concerning the charge that the claim is not valuable for minerals, I find nothing in these affidavits in the nature of new evidence, which would have warranted my predecessor in rehearing the case of the Townsite of Deadwood, above mentioned. That case was a final adjudication by this Department of the mineral character of the claim in question, after a full hearing, which has been carried into execution by the issue of the patent. There is no showing in the papers before me that Hawke fraudulently procured the testimony on which said adjudication was made, or fraudulently excluded testimony which would have induced a different adjudication. The question therefore appears to have been fairly and fully tried, and to reach a different conclusion now and recommend the suit prayed for, on these general denials of the mineral character of the land, "is," as was said in the case of Thomas Starr (2 L. D., 759), "to invite not only want of respect for the adjudications of this office, and the dependent patents, but endless litigation."

For the foregoing reasons I must decline to recommend the institution of a suit to vacate said patent.

HOMESTEAD RIGHT—SOLDIERS' DECLARATORY STATEMENT.

STEPHENS v. RAY.

By the filing and abandonment of a soldier's homestead declaratory statement the right to make homestead entry is exhausted.

The circular of December 15, 1882, so provided, and should govern cases arising thereafter.

Acting Secretary Muldrow to Commissioner Sparks, September 8, 1886.

I have considered the case of Henry W. Stephens v. George T. Ray, on appeal by the former from your office decision of January 31, 1885, canceling his homestead entry, made March 22, 1884, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 15, T. 40 N., R. 24 W., 5th P. M., Booneville district, Missouri, for conflict with the prior claim of said Ray.

The tract in question was originally covered by the homestead entry of one Susan Groff, made September 13, 1882. March 10, 1883, said Ray initiated contest against Groff's entry for abandonment. Groff relinquished March 18, 1884—before the contest came to trial; and Groff's entry was at once canceled. March 18th (same day) Stephens made homestead entry of the tract. March 22 said Ray was allowed to make homestead entry of the tract. Your office thereupon, in view of the fact that Ray by initiating contest had procured the relinquishment of Groff's entry, and thereby had acquired preference right for thirty days to enter the same, held Stephens's entry for cancellation.

From said action of your office Stephens appeals, on the ground mainly that Ray was not a qualified entryman having previously exhausted his homestead right. This Ray under oath denies.

It appears from the records of your office that the said George T. Ray, on November 13, 1878, filed at the Wa-Keeney land office, Kansas, pre-emption declaratory statement for the SE. $\frac{1}{4}$ of Sec. 20, T. 13, R. 25 W.; and filed a relinquishment for the same May 27, 1880. Also that he filed soldier's declaratory statement, at the same office, May 31, 1880, for the SW. $\frac{1}{4}$ of Sec. 32, T. 13, R. 25. But Ray considers that the filing of such soldier's declaratory statement did not exhaust his right to make an ordinary homestead entry.

I do not think this contention is sustained by the law.

It will not be disputed that the law allows but one homestead privilege. That privilege is in general exercised when a qualified claimant makes entry under the homestead law. If he abandons his claim or fails to meet the requirements of law relative to homestead entries he can not get title to the land covered by his entry, and said entry is canceled. In such case although he has acquired no land, his rights under the homestead law are exhausted and he can not again make entry of that or any other land.

Section 2304, *et seq.*, of the Revised Statutes, make special provisions with regard to certain classes of soldiers and sailors, their widows and minor children. Among these is the privilege of securing the right to enter under the homestead law a particular tract by filing a declaratory statement setting forth that the declarant has located a certain tract and that he intends to enter the same.

Such statement will hold the land described therein for a period of six months for the benefit of the declarant, and his rights if he enter at any time within the six months relate back to the date of his filing. He is for that time as completely protected and the land is as completely cut off from appropriation by another as if he had already entered it. In other words, he has exercised his homestead privilege, and all other claims to the land, initiated subsequently to his filing, are for the time being subordinate to his, and will amount to nothing if he comply with the conditions subsequent which are prescribed by the law.

In administering the homestead law its general purpose and design are to be kept in view. It extends to all who are by its terms qualified to make entry an equal opportunity to secure title to not exceeding one hundred and sixty acres of public land. In the exercise of the privilege thereby conferred, Congress has seen fit to grant to certain persons on account of military or naval service the special privilege of securing land and holding it for a period not exceeding six months before making actual entry, by their filing what is termed a soldier's declaratory statement for the same. This privilege Ray, the appellee in this case, it appears, exercised in Kansas in May, 1880.

He has since, to wit, March 22, 1884, been permitted by the local office, acting under section two of the act of May 14, 1880, to make homestead entry in Missouri of the tract in question, and this while Stephens, the appellant, had an entry of record, which he had made a few days previously.

Your office justified this action on the ground that the rule laid down in circular of December 15, 1882 (1 L. D., 36), relating to soldiers' homestead declaratory statements, is not retroactive and therefore Ray's entry is not subject to cancellation.

Said circular in section four thereof declares that "a soldier will be held to have exhausted his homestead right by the filing of his declaratory statement; it being manifest that the right to file is a privilege granted to soldiers in addition to the ordinary privilege only in the matter of giving them power to hold their claims for six months after selection; but it is not a license to abandon such selection with the right thereafter to make regular homestead entry independently of such filing." Said circular was approved by the Department, and must, I think, be regarded as laying down for the guidance of your office the rule by which it should be governed in all applications to enter, made after its promulgation.

Whatever practice may have prevailed before, thereafter an applica-

tion to enter under the homestead law must be refused, if it appear that the applicant has at any time filed a homestead declaratory statement all claim under which he has since abandoned. If the provisions of the circular of 1882 were made to apply to entries theretofore allowed so as to destroy rights which had been accorded under a previous practice, such ruling would properly be regarded as rendering the circular retrospective in its operation, and its propriety might be questioned.

But to say that every one who after its promulgation applies to enter must show himself within its provisions, does not render it retroactive.

It simply applies in future cases certain tests which must be met by the applicant for the purpose of showing that he is qualified to make entry.

If that portion of the circular, herein quoted, correctly interprets the law, then its limitations must be applied to every case where application to enter is thereafter presented. To rule otherwise would be to violate the law. The circular itself, referring to the language quoted, says, "This is clear from the statutory language."

As has been stated, Ray, on the 22d of March, 1884, applied and was allowed to make homestead entry of the tract in question. For the reasons above given that allowance was, under the provisions and limitations of the circular of December 15, 1882, error, Ray having exhausted his right to make homestead entry by having filed his homestead declaratory statement in May, 1880, the claim which he afterwards abandoned. Your office decision is therefore reversed, and Ray's entry will be canceled.

RAILROAD GRANT—COMMON GRANT LIMITS.

JARRETT *v.* MISSOURI, KANSAS & TEXAS RY. CO.

The words, "to be selected within twenty miles from the line of said road," occurring in the granting clause of the act of July 25, 1866, do not operate to make the grant a float, but serve only to define the limits of the grant.

Priority of grant determines the right to land lying within common granted limits.

Acting Secretary Muldrow to Commissioner Sparks, September 8, 1886.

I have considered the case of W. D. Jarrett *v.* the Missouri, Kansas and Texas Railway Company, on appeal by the latter from your office decision of July 22, 1885, holding for cancellation its selection for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 11, T. 35 S., R. 22 E., Independence, Kansas, and allowing Jarrett to make homestead entry for the tract.

The land in question is within the ten mile (granted) limits of the grant made by act of July 26, 1866, (14 Stat., 289,) in aid of the Union Pacific Railroad, Southern Branch (now Missouri, Kansas and Texas Railway) and also within ten miles of the route indicated by the map of definite

location filed by the Kansas and Neosho Valley Railroad Company, pursuant to the act of July 25, 1866 (14 Stat., 236).

Said last mentioned act provided :

"That for the purpose of aiding the Kansas and Neosho Valley Railroad Company to construct and operate a railroad there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, *to be selected within twenty miles from the line of said road*; but in case it shall appear that the United States have when the line of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved to the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States nearest to the sections above specified so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated. *And provided further*, That none of the lands hereby granted shall be selected beyond twenty miles from the said road."

By act dated one day *after* the above quoted act, to wit, on July 26, 1866, Congress granted to the State of Kansas, for the use and benefit of the Union Pacific Railroad Company, Southern Branch, "every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile: *and provided further* that said lands hereby granted shall not be selected beyond twenty miles from the line of said road."

Under this act the Missouri, Kansas and Texas road was definitely located January 8, 1868.

The Kansas and Neosho Valley road was duly constructed, and was definitely located January 5, 1869. It took patents for many tracts of land after definite location, but, its grant being repealed by act of March 3, 1877 (19 Stat., 404), subsequently reconveyed such tracts to the United States in accordance with the provisions of that act. The tract in question was never actually selected by said road, but was selected by the Missouri, Kansas and Texas Company June 25, 1883, and the selection has never been approved.

The questions herein involved turn on the construction to be given to the words of the act in aid of the Kansas and Neosho Valley road.

The attorneys for appellant contend that the act gives:

"1st. A grant 'to the extent of ten sections per mile' to be selected within a larger limit of twenty miles on each side of the road.

2d. The right to select from the public lands (odd or even sections) *within the same limit* to compensate for any losses caused by prior sales or disposals by reservation or settlement claims."

A glance at the history of said act affords an insight as to its real

meaning. The bill originated in the Senate, and as it passed that body the granting clause read as follows:

"There is hereby granted to the State of Kansas for the use and benefit of said railroad company every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road." (Cong. Globe, 1st Sess., 30th Cong., 4058).

It will be conceded that this clause, as quoted, makes a grant in place, and is substantially in the ordinary words of railroad grants. When the bill was called up in the House, there was added to the above granting clause the words, "to be selected within twenty miles from the line of said road." On this amendment there was no debate. The bill was read a first and second time, and thereupon Mr. Anderson said: "On behalf of the Committee on Public Lands, I submit the following amendment: in section one, line seventeen, after 'road' insert 'to be selected within twenty miles from the line of said road.'" The amendment was agreed to without division or comment. Indeed the bill was not debated in the House at all. (Ibid., 4059). It was returned to the Senate and there the amendment was concurred in without debate or division. Now the appellant urges that this grant "was a *float* of land to be *selected*, and could take effect only from date of *selection*." I am unable to concur in this opinion. The act has never received a construction by this Department, probably owing to its repeal in 1877. But the contemporaneous and constant construction of your office has been that the alternate odd sections not disposed of within ten miles of the road were "granted lands," and that the public lands lying between the ten and twenty mile limits were subject to selection as "indemnity lands." This is evidenced by the official maps of your office and by the fact that patents in both limits were issued in conformity with this view. The correctness of such construction is further evidenced by the fact that section two of the act raises to double minimum the reserved *even* sections only within *ten* miles of the road, just as in all other railroad grants having a ten mile *granted* limit. But further, an examination of the debates in Congress clearly indicates that this grant was intended by Congress to be in line with other railroad grants and not a departure therefrom; and I will be slow to declare that the simple amendment, "to be selected within twenty miles from the line of said road," adopted without division and without debate, and that after the bill had passed the Senate, operates to radically change the nature of the act from a grant in place to a mere float, unless it appears that the amendment cannot be otherwise reconciled with the act. After a full examination of the case, I am of opinion that the amendment in question has the same force and effect as the usual proviso at the end of the first section, to wit: "That said lands hereby granted shall not be selected beyond twenty miles from the line of said road." It operates merely to define the boundary beyond which lands cannot pass

under the grant. I am therefore convinced that the contemporaneous construction of your office was correct.

In this view a case is presented in all respects similar to the case of Missouri, Kansas and Texas Railway Company *v.* Kansas Pacific Railway Company (97 U. S., 491), wherein the court held, "The rights of the contesting corporations to the disputed tracts are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads." The Kansas and Neosho Valley Company having the prior grant, and having constructed its road, its rights took effect on definite location, and relating back, cut off all claim by the Missouri, Kansas and Texas road. Its selection is therefore rejected, and the decision appealed from is accordingly affirmed.

RAILROAD GRANT—INDIAN TITLE.

NORTHERN PAC. R. R. CO. *v.* CLARK.

The extinguishment of Indian title contemplated by the second section of the grant to this company had reference to lands lying within what was then known as the territory of the Indians, and not to such as were embraced within technical reservations.

As the Indian title to these lands was not extinguished until after the definite location of the road they were accordingly excluded from the grant.

Acting Secretary Muldrow to Commissioner Sparks, September 8, 1886.

This is a motion for review of the decision of my predecessor of September 17, 1884, involving the question of the right of the Northern Pacific Railroad Company under its grant to the lands embraced within that part of the Crow Indian reservation released under an agreement of sale accepted and ratified by Congress April 11, 1882 (22 Stat., 42).

The case came before my predecessor upon an appeal from the decision of your office awarding to Clark the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 1 S., R. 11 E., Bozeman, Montana, which is embraced in the part of the reservation aforesaid.

The company claims that these lands became subject to their right, after the extinguishment of the Indian title, by virtue of the 2d section of the act of 1864 (13 Stat., 365) making the grant to this road, whereby the government agreed in terms that it would "extinguish the Indian titles to all lands falling under the operation of the act and acquired in the donation to the road named in this bill."

The question therefore arises: What lands were contemplated by this act, to which the government agreed to extinguish the Indian title?

By the act of June 30, 1834, all that part of the United States west of the Mississippi River, except the States of Missouri and Louisiana and the Territory of Arkansas, was declared to be the Indian country. The fee of this vast territory was in the United States, subject, how-

ever, to the full right of the various tribes of Indians to the lands they occupied, until that right should be extinguished by the United States, with their consent. The territory then occupied by the Crows extended over a vast range of country, from the northern boundary of New Mexico to the Missouri River in northern Montana. It had no fixed boundaries, and was not recognized strictly as a reservation, but simply as the territory of the Crows. This was the condition of their territory when the grant to the Northern Pacific road was made; and at that time no treaty had been made with said Indians guaranteeing to them a positive reservation for their exclusive use and occupation.

In 1868, four years after the grant to this road, a treaty was entered into between the United States and the Crow tribe of Indians, by which a tract of land bounded on the east by the 107th degree of longitude, on the south by the territory of Wyoming, and north and west by the Yellowstone river, was set apart for the absolute and undisturbed use and occupation of said Indians, and by said treaty the Crows relinquished all title, claims or rights to any portion of the territory of the United States, except what was embraced within the defined limits of such reservation.

This treaty further provided that, under certain conditions therein named, individual members of said tribe may within said reservation select lands for agricultural purposes which shall be certified to them; and that, when their lands shall be surveyed, Congress shall provide for protecting the rights of such settlers in their improvements, and may fix the character of the title held by each. It was further provided that no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as before provided.

By this treaty the Indian title was extinguished to all lands occupied by the Crows and claimed by them as their territory (except the reservation named); and by the same instrument an absolute reservation of a tract of land, designated by fixed boundaries, was formally set apart for their use and occupation, and the full and free use and enjoyment of the same was guaranteed to them by the government.

I am therefore of the opinion that Section 2 of the act of 1864, providing that the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, the Indian title to all lands falling under the operation of said act, contemplates such lands as were then embraced in what was generally known as the territory of the Indians, and not such parts of said territory as were embraced in defined and technical reservations. Such reservations are as free from the operation of the grant as a reservation for any other purpose.

The land in controversy is within that portion of the reservation created by the treaty of May 7, 1868 (15 Stat., 649) which on June 12, 1880,

the Crow Indians agreed to sell to the United States in consideration of certain conditions therein named, which was accepted by the United States April 11, 1882.

The road claims that from and after the date of the agreement of June 12, 1880, the Indian title to that land was extinguished, and that from that date it became part of the public domain, and was not in a state of reservation at the date of the filing of their map of definite location June 27, 1881, because the act of April 11, 1882, accepting, ratifying and confirming said agreement, related back to the original agreement of June 12, 1880.

If this petition be true then, under the ruling of the Department in the case of *Rees v. Central Pacific R. R. Co.* (5 L. D., 62), that the right of the road is determined by the condition of the land at the time of the filing of map of definite location, there is no question that the road would be entitled to the land under its grant.

But I do not think that this theory is sustained by any principle of law.

The agreement of a delegation of the tribe, made May 7, 1880, which was afterward modified and concurred in by the majority of the tribe, and submitted June 12, 1880, was simply an offer on the part of the Crows to sell to the United States a certain part of their reservation, for a consideration therein named. The agreement was not in any manner acted upon until the act of April 11, 1882, when Congress *accepted*, ratified and confirmed it.

I am unable to see in what respect this agreement differs from any other, by which it may dispense with an essential element pertaining to all contracts—to wit, that mutual consent is requisite to the creation of a contract, which becomes binding only when a proposition is made on one side and accepted on the other.

Counsel for the road cite the case of *Davis v. Concordia Parish* (9 Howard, 280,) to the effect that "all treaties, as well those for cession of territory as for other purposes, are binding upon the contracting parties, unless otherwise provided in them, from the day of signing, and the ratification relates back to the day of signing; and also the case *Landes v. Brandt* (10 Howard, 378,) to the effect that "When there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this all other acts shall have relation."

These cases, as well as all other cases in which this rule applies, refer to such treaties, cessions or agreements as have been entered into between the parties to the contract or their representatives, complete in all the essential elements necessary to the validity of a compact depending solely upon the ratification of the acts of such representatives, or the performance of some condition or stipulation therein required.

There was no original or initial act on the part of the government prior to the act of April 11, 1882, to which that act of acceptance was concurrent, and hence the doctrine of relation does not apply.

I therefore hold that the land was not a part of the public domain until the act of April 11, 1882, and that it was in a state of reservation at the date of the filing of the map of definite location, July 27, 1881, and hence was excepted from the operation of the grant.

NOTICE AS EFFECTED BY SETTLEMENT; PATENT.

L. R. HALL.

The notice given by settlement and improvement extends only to the quarter section as defined by the public surveys.

Suit to vacate a patent on behalf of an alleged prior settler not advised, it appearing that he has an adequate remedy of his own if his allegations of priority are true.

Acting Secretary Muldrow to Commissioner Sparks, September 9, 1886.

On October 14, 1880, Lewellyn R. Hall filed declaratory statement for the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 26, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 35, T. 120, R. "63," Watertown, Dakota, alleging settlement September 1, 1880.

On November 15, 1880, William Pascoe made additional homestead entry for the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 35, T. 120, R. "64," final certificate issuing the same day. At the same time Dudley Hix made additional homestead entry for the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 35, T. 120, R. "64," and final certificate issued the same day. On December 7, 1880, the local officers forwarded the corroborated affidavit of Hall, setting forth that he had settled on the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 26, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 35, T. 120, R. "64," and that through mistake he had filed as above indicated. On February 3, 1881, he was allowed by your office to amend his filing so as to describe the tracts covered by his alleged actual settlement.

On July 20, 1881, the homestead entries were patented.

On March 9, 1882, Hall offered final proof, which was rejected by the local officers, because of conflict with the patented homestead entries. On appeal your office on July 10, 1882, held that Hall could not enter while the patents were outstanding, and advised that the patentees be requested to surrender said patents. The request was made, and C. H. Prior, the representative of said Pascoe and Hix, reported that he had sold the quarter section of land, part of which was included in said filing of Hall, and that the whole tract in contest had been sold in good faith.

By letter of March 27, 1886, Hall, by attorney, represents that he has continued to live on said land in peaceable possession since filing, that he has the whole tract in cultivation, and that his possession is now threatened by the holder of the patents.

Your office, on the present application of Hall, recommends that proceedings be initiated looking to the cancellation of said patents, or that your office be "instructed whether Hall should be permitted, notwithstanding the outstanding patents to renew his proof and make entry of

the land, in order to give him a standing in court as against the claimants under the patents." Said letter further reports that the proof submitted by Hall has been lost.

I am unable to concur in said recommendation.

The four quarter-quarter sections now claimed by Hall are in a line running north and south, two of them being in section 26 and two in section 35. It does not appear in which section settlement was made, nor on which subdivisions the improvements were located. In the case of *Quinby v. Conlan* (104 U. S., 420), it is ruled that "a settlement upon a portion of a quarter section, and making the improvements required by law, will sustain a pre emptive claim to the whole quarter section as against subsequent settlers." Following this rule, I am of opinion that the settlement and improvements of Hall, if confined to section 26, would not be such notice as the entrymen in section 35 would be bound to regard. The notice given by settlement and improvement applies only to the quarter section as defined by the public surveys. If therefore the rights of the entrymen attached before notice of the claim of Hall was given, he is without remedy. If, however, Hall had given notice by settlement or improvement, or in any competent manner, of his claim to the tracts in section 35 prior to the making of said entries, then he has an adequate remedy in his own hands. The case then presented will be in all material respects similar to the case of *Samson v. Smiley* (13 Wall., 91—more fully reported in 1 Nebraska, 57).

Smiley made settlement, filed his declaratory statement, and resided on the land. Afterwards Samson settled on the tract and filed declaratory statement therefor. A contest arose and the land was awarded to Samson by the Secretary under an erroneous construction of the pre-emption law. Patent issued to Samson, and Smiley filed his bill to recover the legal title from him and his grantees. A decree was rendered in favor of Smiley, according to the prayer of his bill.

I am therefore of opinion that it is unnecessary to institute suit in the name of the United States in favor of applicant, in any aspect of his case, and said recommendations are accordingly rejected.

PRACTICE—AFFIDAVIT FOR CONTINUANCE.

COUGHLIN *v.* DONAN.

Under the instructions of December 27, 1882, an affidavit for continuance is sufficient though executed before the day set for hearing and before some officer other than the register or receiver.

Acting Secretary Muldrow to Commissioner Sparks, September 11, 1886.

December 20, 1883, Peter Donan made homestead entry for the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and Lot 1, Sec. 17, Lot 5, Sec. 18, and Lot 1, Sec. 20, T. 153 N., R. 63 W., Grand Forks, Dakota Territory.

February 27, 1885, Thomas Coughlin initiated contest against said entry, charging abandonment, and hearing was fixed for April 30th following. On that day claimant, with his attorney and witnesses, appeared; contestant did not appear personally, but was represented by attorney, who filed an affidavit sworn to by contestant on the preceding day before a notary public. In said affidavit contestant asked for a continuance of the case to a day to be fixed by the local officers, and for cause alleged that the attendance of certain material witnesses could not be procured. Claimant opposed the continuance, and after argument the local office overruled the motion and dismissed the contest, because the affidavit filed did not conform to Rule of Practice No. 20, in that it was not made before the register and receiver, and in that it was not sufficiently specific. Contestant thereupon appealed to your office, which on August 1, 1885, reversed the action of the local officers, and remanded the case to them for further proceedings under the affidavit of contest.

Upon consideration of a motion for review and reconsideration of said decision, filed on behalf of Donan, your office on November 12th following adhered to the said ruling of August 1, 1885, and stated that said decision "was rendered in accordance with instructions from this office under date of December 27, 1882, 1 L. D., 134 and 135." Donan thereupon filed an appeal. On January 13, 1886, your office held the appeal would not lie, as no decision on the merits of the case had yet been rendered, the ordering of a hearing being merely an interlocutory action. Hence the present application for certiorari under Rule 83 is filed.

Upon examination of the affidavit for continuance I find the allegations therein to be sufficient. The said instructions of December 27, 1882, are in answer to an inquiry from the local officers at Montgomery, Alabama: "5. Can the affidavit required in Rule 20, Rules of Practice, be made prior to the day of trial, and before an officer other than the register and receiver?" The Commissioner says: "5. The most natural time to make the affidavit would seem to be on the day set for trial; but there could be no valid objection to the party making it at any time prior thereto. The proper time, however, to consider the affidavit is when the case comes up for trial. The rule presumes the affidavit to be made before the register and receiver. If the party is represented by counsel, an affidavit by said representative made before the register and receiver is satisfactory, or it may be made before any other officer qualified to administer oaths and using an official seal." Under these instructions said affidavit for continuance was authorized, and the case was improperly dismissed. The case will now proceed to hearing as directed in your said office letter. The papers transmitted by your letter of March 2, 1886, are herewith returned.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

ST. PAUL, M. & M. RY. CO. v. EVENSON.

An entry made after the map of definite location had been filed and accepted, but before notice of withdrawal thereunder was received at the local office, is confirmed by the first section of the act of April 21, 1876.

Acting Secretary Muldrow to Commissioner Sparks, September 11, 1886.

I have considered the case of *Lars Evenson v. St. Paul, Minneapolis and Manitoba Railway Company*, on appeal by the latter from your office decision of April 13, 1885.

It appears from the record that Evenson on the 25th of January, 1872, made homestead entry for lot 11 of section 27 and lot 2 of section 34, T. 128 N., R. 39 W., Fergus Falls land district, Minnesota; that he made final proof in 1878, which was accepted as satisfactory, and on May 25, 1885, the register and receiver, acting under authority of your office decision, the appeal from which is now before me, issued final certificate and receipt to Evenson.

It further appears that the tract in question is within the ten miles or granted limits of the line of the St. Paul, Minneapolis and Manitoba Railway (formerly St. Paul and Pacific, St. Vincent Extension). The grant referred to was made to Minnesota to aid in the construction of certain railroads. The act of Congress making the grant was approved March 3, 1857. It granted every alternate section of land, designated by odd numbers, for six sections in width on each side of the lines of road provided for by the act, and required that the roads be completed within ten years. (11 Stat., 195.)

The act of March 3, 1865 (13 Stat., 526), increased the grant from six to ten sections per mile, and extended the time for the completion of the roads to a period eight years after the passage of said act.

The act of 1857 provided for the selection of indemnity land in lieu of any sections or parts of sections granted which it should be found had been sold, or to which the right of pre-emption had attached when the lines or routes of said roads were definitely fixed.

The act of 1865 (Sec. 7) provided that "as soon as the governor of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said road and branches, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act."

It appears from the recital in your office decision that the map of definite location of the line of route was accepted and approved by the Secretary of the Interior December 19, 1871, and that diagram showing the line of the road, together with the ten and twenty miles limits, were transmitted to the local office by your office letter of February 6, 1872, which also ordered the withdrawal of the odd-numbered sections

in both the granted and indemnity limits. Said letter was received at the local office February 15, 1872.

As already stated, Evenson made his homestead entry January 25, 1872, covering a tract, a portion of which is in an odd numbered section, within the ten miles limit of the grant for the benefit of the railroad.

It is to be observed that said homestead entry was made after the date of the acceptance of the map of definite location of the line of road by the Secretary of the Interior, but prior to the date when notice of said acceptance was received at the local land office.

In March, 1874, your office held the homestead entry for cancellation, in so far as it embraced land in the odd-numbered section, because of conflict with the railroad grant. In January, 1875, acting under authority of the act of June 22, 1874 (18 Stat., 203), it changed its action above indicated and allowed the entry to stand intact as to all the lands originally embraced therein, subject to final proof.

July 1, 1878, Evenson made final proof showing compliance with the homestead law in all respects, and instead of relying on your office decision of January, 1875, and the act of June 22, 1874, above mentioned, he invoked relief under the provisions of the act of April 21, 1876 (19 Stat., 35). The first section of said act provides:

“That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to time when the notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed and patents for the same shall issue to the parties entitled thereto.”

The entryman's reason for invoking the provision of law just quoted instead of relying upon the act of June, 1874, to which he was referred by your office letter of January 14, 1875, is not stated, but it may be found in the fact that the Department has held the act of 1874 to be inoperative, because certain conditions named therein had not been complied with. The second section of that act required that the company before it could acquire any rights under the act should, by a certificate, duly executed and filed as therein provided, accept the terms and conditions of the act. As long ago as December 11, 1876, my predecessor, Secretary Chandler, held, in the case of *Kemper v. St. Paul and Pacific R. R. Company* (3 C. L. O., 170), that as the company had not accepted or complied with the terms and conditions of the act, it was therefore inoperative for any purpose. The company has never to this date accepted the terms of said act of 1874, and the decision of 1876, above mentioned, has since been followed by this Department. A rec-

ognition of this fact doubtless led the entryman in this case to now rest his claim on the act of 1876, the first section of which has been quoted.

It remains, therefore, to inquire whether this case comes within the purview of that section.

The tract in question is within the limits of the grant for the benefit of the railroad company herein named. At the time the entry was made by Evenson the line of road had been definitely located and the map of location had been accepted by the Secretary of the Interior, but notice of said acceptance and order of withdrawal had not yet reached the local office.

Your office finds, and it is not denied by the company, that the entry was made in good faith, and that the homestead law has been complied with.

The Department has repeatedly held on such a state of facts that the act of 1876 is mandatory upon the executive department; that in such cases the entries are confirmed by the act and that in accordance with its terms and requirements patents shall issue. For decisions on the first section of the act, see cases of *Plouch v. Missouri River, Fort Scott and Gulf R. R. Co.*, (3 C. L. O., 83); *Streeter v. M., K. and T. R. R. Co.*, (4 C. L. O., 180); *Atchison, Topeka and Santa Fe R. R. v. Dodge*, (5 C. L. O., 134); *St. Paul, Minneapolis & Manitoba Ry Co. v. Larson*, (11 C. L. O., 150). In some of these cases homestead entries were made after definite location, but before notice of withdrawal was received at the local office; in others, pre-emption filings were made after notice of withdrawal on map of definite location was received at the local office, but settlement was alleged to have been at a date between the date of filing map of definite location and that of receipt by the local office of notice of withdrawal.

Before deciding the *Plouch* case, above cited, Secretary Chandler referred to the Attorney General for his opinion certain questions raised therein. *Plouch* occupied just the position in that case with reference to the railroad company in contention with him, that Evenson does in this case with reference to the company now here as appellant, and the Attorney General held that the tract claimed by *Plouch* was public land within the meaning of the act of 1876, and that the case came within the provisions of that act. (15 Ops., 583).

In the *Streeter* case (*supra*) Secretary Schurz discussed the act very fully, giving the reasons, as disclosed by the debates in Congress, which led to its passage, and citing numerous authorities as to the proper construction of a remedial statute.

It is true the doctrine of the *Streeter* case has, by my decision in the case of *Wisconsin Central Railroad Company v. Stinka* (4 L. D., 344), been overruled to the extent of saying that in a case where patent has issued, this Department is without jurisdiction over the land covered thereby, and consequently a second patent cannot issue. But the modification only goes to the extent indicated. It does not change or in-

terfere with the rule of the Department where patent has not issued, and consequently does not affect this case.

As I read section one of the act of 1876, I am necessarily led to a conclusion according with that arrived at by my predecessors in their decisions herein cited, with the exception above noted as to cases where patents have issued.

The decision of the supreme court in the case of *Van Wyck v. Knevals* (106 U. S., 360), cited by the company in support of the position that, when the route of the road was definitely fixed, the grant took effect upon the odd numbered sections by relation, as of the date of the grant, can not affect the conclusion in this case. The rule laid down in the *Van Wyck* case is not different from that followed by the Department at the date of the passage of the act of 1876 and since. In fact, the act seems to have been the outgrowth and result of just that doctrine, and was passed to save rights which would otherwise be lost under the interpretation given to railroad grants. In other words, the rule of the Department made the act of 1876, especially the first section thereof, necessary.

It follows that until said law is repealed by Congress, or construed or declared inoperative by the supreme court in a case having a direct reference to the act, it must control and be enforced according to its letter and spirit, as interpreted by this Department.

Regarding the act as remedial and as clearly expressive of the intention of Congress, and finding that the case under consideration comes within the provisions of section one thereof, I must hold Evenson's entry confirmed thereby.

Your office decision is accordingly affirmed.

HOMESTEAD CONTEST—SETTLEMENT RIGHTS.

GUDMUNDSON *v.* MORGAN.

As between two settlers on land covered by the entry of another, priority of right is held to be with the one who first settled and filed application for the land together with the relinquishment of the former entryman.

Acting Secretary Muldrow to Commissioner Sparks, September 11, 1886.

I have considered the case of *Gilbert Gudmundson v. David W. Morgan*, as presented by the appeal of the former from the decision of your office, dated April 14, 1885, dismissing his contest against the latter's homestead entry No. 6565 of the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 20, T. 24 N., R. 6 E., made May 21, 1884, at the Olympia land office, Washington Territory.

The record shows that on January 19, 1879, one John P. Adams made homestead entry No. 2,641 of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 20; that

on May 29, 1883, Morgan made homestead entry No. 5203 of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 20; that on March 14, 1884, the local land office forwarded Morgan's application to amend his homestead entry so as to include said S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and at the same time forwarded Adams's relinquishment of his said entry executed June 11, 1883.

On April 22, 1884, your office directed the local officers to advise Morgan that he would be allowed to amend his entry so as to embrace the forty acres upon which his improvements were situated, if such amendment did not increase the area, or his entry would be canceled and he would be allowed to make a new entry. The local officers notified Morgan on April 30, 1884, of his right under said decision.

On February 28, 1884, Gudmundson initiated a contest against Morgan's entry No. 5,203, alleging abandonment, and said contest was dismissed by the local office on April 17, 1884, at the request of the attorney for the contestant.

On May 19, 1884, Morgan relinquished his said entry No. 5203, and on May 21, 1884, made his homestead entry No. 6565. It further appears that on May 21, 1884, the local land officers advised your office that Adams's said entry was canceled upon their records by reason of his relinquishment, transmitted on March 14th, same year, and they were advised by your office letter, dated September 30, 1884, to cancel said entry as of date April 22, 1884. On June 30, 1884, Gudmundson offered his homestead application for the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said Sec. 20, alleging settlement thereon April 22, 1884. Thereupon the register and receiver ordered a hearing to determine the priority of settlement. Both parties appeared at the hearing and offered testimony. From the evidence submitted the local land officers found that Morgan was a miner, working at New Castle, about seven miles distant from his claim; that after he made his first homestead entry Morgan purchased the improvements of Adams, and procured his relinquishment of his said entry, for which he paid one hundred and fifty dollars; that the house purchased from Adams was in a bad condition, and on February 1, 1884, Morgan employed a man to build another house upon said S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, which was finished February 25, 1884; that his (Morgan's) improvements were worth about two hundred dollars (\$200); and that although he had been absent from his claim, yet on account of sickness in his family and its helpless condition he had shown a good excuse therefor. The district land officers further found that Gudmundson first settled upon the land in question on February 27, 1884, and established his residence thereon March 19, 1884; that his house is twelve feet by twelve feet, worth about \$30; that prior to May 21, 1884, Gudmundson had slashed about an acre of the land; that he owns a farm adjoining said land upon which is a furnished house, with a barn, outbuildings and fruit trees; and they held (1) that neither party could acquire any rights by virtue of acts upon land covered by an uncanceled homestead entry, citing *McAvinney v. McNamara* (3 L. D., 552); and

that Morgan was in fact the prior settler; that (2) the application of Morgan to amend his entry withdrew the land from any other disposition, until the same had been finally acted upon, and no adverse claim could legally attach to said land, citing *Sarah Renner* (2 L. D., 43) and *Davis v. Craus et al.* (3 L. D., 218); that (3) Morgan had seventy days from April 30, 1884, within which to appeal or make a new entry; that (4) Morgan has complied with the requirements of the homestead laws, and that his entry should be allowed to remain intact, and Gudmundson's application should be rejected. On appeal your office affirmed said decision.

It was held by this Department in the case of *Geer v. Farrington* (4 L. D., 410), "conceding that while an entry stands uncanceled upon the record, settlers upon the land covered thereby acquire no rights as against the record entryman or the United States, yet, as between such settlers, priority of settlement may be properly considered."

Whether it shall be determined, as was ruled in *Tilton v. Price* (4 L. D., 123), that an application accompanying a relinquishment, transmitted to your office and accepted, absolutely reserves the land so as to deprive a settler who is on the land at the date when such relinquishment is filed, or accepted, of any rights by virtue of his settlement, or if the equitable rights of the claimants shall be considered, it is quite clear that in the present case Morgan has the better right to said tract.

It is suggested, in a letter from Gudmundson, that since said contest was tried, Morgan has abandoned said tract. If that charge be true, there is no reason why it should not be proven in a proper proceeding. *Cleveland v. Dunlevy* (4 L. D., 121).

The decision of your office is therefore affirmed.

HEARINGS ON SPECIAL AGENTS' REPORTS.

Secretary Lamar to Commissioner Sparks, July 6, 1885.

I am in receipt of your letter of the 29th ultimo, submitting a list of cases now pending in this Department on appeal from the action of your office in holding the entries for cancellation on reports of special agents under the circular of July 31, 1885 (4 L. D., 503). These appeals were allowed prior to the amended circular of May 24, 1886 (4 id., 545), directing that "hereafter when an entry is held for cancellation the claimant will be allowed sixty days after due notice in which to apply for a hearing to show cause why the entry should be sustained." In accordance with your recommendation, these cases are now returned to your office for disposition under said circular as amended.

In all cases coming to your office hereafter, where entries have been held for cancellation on agent's reports and the parties notified that they will be allowed the right of appeal, you are directed to order hearings in accordance with the amended circular, instead of transmitting the cases on appeal to the Department.

PRACTICE—REVIEW.

LONG v. KNOTTS.

Review of a decision will not be granted on the ground that it is against the weight of evidence, if there was contradictory evidence on both sides.

When a review is sought on the ground that the decision is not in accordance with the evidence, a general allegation to that effect is not sufficient, but the particular evidence on which the change of ruling is claimed should be specifically set forth.

Acting Secretary Muldrow to Commissioner Sparks, September 14, 1886.

In the case of John C. Long v. Isaac Knotts, involving the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 7, NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 18, T. 19 S., R. 22 W., Wa Keeney, Kansas, decided by the Department July 15, 1886, a motion for review has been filed.

This motion was filed July 29, 1886, and is in the following words: "I hereby request that you will recall said decision and allow me opportunity to call attention to errors therein. I will submit points and argument in review at early date."

No specification of errors or other grounds for said motion appear therewith.

August 13, 1886, there was filed in support of said motion an "argument on review," in which it is set forth as reasons therefor that: "In your summing up and conclusion in said decision you say (1) 'The only witnesses to the payment of the money are Long and his wife and son. (2) No receipt was taken, and (3) there was no transfer of the possession of the property at that time.' Are not these statements remarkable as a basis for an adverse decision."

Upon this allegation of errors, if it may be so styled, the argument proceeds apparently upon the hypothesis that the evidence submitted in the case does not warrant the decision of the Department, and my conclusion that such is the fair intendment of the motion is confirmed by the statement at the close of the argument that "In your decision of July 15, 1886, proper consideration was not paid to the important matter of the burden of proof being upon Knotts."

It will be remembered that this case involved the validity of a certain relinquishment that had been executed by Knotts and filed by Long, and in the decision complained of it was determined "that the relinquishments were obtained from Knotts by a fraudulent scheme concocted by several persons and that Long was one of the number," and upon this finding of fact the judgment rested. Now the motion only indirectly takes issue with the above finding, and that through argument addressed to minor matters considered by the Department in arriving at the general conclusion. It is not claimed that the evidence was not all duly considered, but it is alleged in effect that such consideration resulted in an incorrect conclusion.

Rule 76 of the rules of practice provides that reviews "will be allowed in accordance with legal principles applicable to motions for new trials at law," and under this rule it has invariably been held that following the doctrine observed in the courts of law a review of a decision will not be granted on the ground that it is against the weight of evidence, if there was contradictory evidence on both sides. *Richard v. Davis* (1 L. D., 139); *State of California* (2 C. L. L., 213). In the case now under consideration there was an unusually large amount of testimony submitted and of a character so conflicting and contradictory that it was said in the departmental decision that "every material allegation is so plausibly contradicted that I am driven to the surrounding circumstances to decide the question." There is therefore no ground now presented authorizing a review of this decision, so far as the motion herein assails the judgment as not justified by the evidence. In this connection, it is proper to say that when review is asked on this ground it is not enough to merely allege in general terms that the decision is against the weight of evidence, but the particular evidence on which the change of ruling is claimed should be specifically set forth, otherwise the Department would be compelled to twice examine each case wherein the unsuccessful party or his attorney saw fit to allege that the judgment was against the weight of evidence. As there is no new question presented by this motion, it must be denied for the reasons herein assigned.

DESERT LAND ENTRY—FINAL PROOF.

CHARLES H. SCHICK.

Proof of crops raised may be regarded as supplementing proof of irrigation, but should not be held as an essential requirement in final proof.

The source and volume of the water supply, the carrying capacity of the ditches, and the number and length of all ditches on each legal sub-division should be specifically shown, the witnesses stating their means of knowledge and whether they at any time saw the land effectually irrigated.

Acting Secretary Muldrow to Commissioner Sparks, September 14, 1886.

I have before me the appeal of Charles H. Schick from your decision of April 14, 1886, rejecting his desert land final proof made under original entry No. 514, covering land in sections 5, 7, and 8, T. 23, R. 67, Cheyenne land district, Wyoming.

The declaratory statement herein was filed by Schick March 16, 1883, and he offered final proof and payment March 16, 1886, which was rejected by the local office, on the ground that the proof did not show the production of an agricultural crop as the result of the alleged reclamation. This decision was affirmed by your office, and Schick accordingly appealed.

It appears from the final proof that the water was not brought upon the land until the fall of 1885, and that it was therefore not possible,

when final proof was made, to show any crop following such irrigation. In explanation, Schick files a supplemental affidavit with his final proof, to the effect that he employed one Hunton to bring water upon the land so as to utilize the same for crop purposes during the summer of 1885, but that said Hunton failed to fulfil his contract, which fact the claimant did not learn until July, 1885, whereupon he at once began the work himself, not completing it, however, in time to raise a crop that season. On appeal Schick alleges that he has acted in good faith, expending over \$1,200 in bringing water upon the land, and that he expects to raise a crop thereon this year.

The desert land act was approved March 3, 1877 (19 Stat., 377), and provides that a qualified person may, upon the payment of 25 cents per acre, "file a declaration under oath with the register and receiver of the land district in which any desert land is situated, that he intends to *reclaim* a tract of desert land not exceeding one section, *by conducting water upon the same*, within the period of three years thereafter. At any time within the period of three years after filing said declaration, upon making *satisfactory proof* to the register and receiver *of the reclamation* of said tract of land *in the manner aforesaid*, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him."

The language quoted constitutes the sole statutory authority in the matter of final proof, so far as the act itself is concerned.

March 12, 1877, the General Land Office issued instructions under said act, requiring only satisfactory proof of water having been conducted upon the land in order to establish the fact of reclamation. (4 U. L. O., 22). Further instructions were issued September 3, 1880 (7 C. L. O., 138), wherein it was held that the most "satisfactory proof" of *bona fide* reclamation is the raising of an agricultural crop, but that it would be sufficient to show a crop raised during the third year of the entry.

The forms upon which final proof is made have from the first provided for a showing of cultivation subsequent to the entry and alleged reclamation.

The Department held in the case of *Wallace v. Boyce*, August 2, 1882, (1 L. D., 54,) "That the intentment of the statute is to provide for the reclamation of such lands from their desert condition to an agricultural state. Congress specified water as the means to that end, but the mere conveying of water upon the land is not a fulfillment of the law, unless in sufficient quantity to prepare such land for cultivation. . . . The forms of proof are drawn with direct reference to the proof of such facts as will show compliance by showing results."

February 9, 1885, (3 L. D., 385,) the Department, referring to the case of *Wallace v. Boyce*, expressed the opinion that the rule therein should be modified, because the requirement of crops would often work a hardship, and the act did not require the same. But the Department while

so modifying its former expression said: "It is true that evidence that such reclamation is perfect and complete will be by proof of an agricultural crop raised on such land by the aid of the water so brought on the land, except in exceptional years as hereafter mentioned. But it is not the only proof, and might not be at all times the best proof. . . . Taking a favorable year, the proof of an agricultural crop might enable the claimant to enter, and the following years, and many years thereafter, he might not be able to raise a crop with the amount of water owned by him in connection with the land he claims to have reclaimed." After reaching the conclusion in said decision that the proof was sufficient when it shows "that the claimant is the owner of a sufficient quantity of water to irrigate the land," and has conveyed such water to the land in such manner that he can use it for the purpose of irrigating the crop, it was said, "Your regulations should therefore be so amended as to allow other evidence of the reclamation of land besides that of a growing crop. The raising of an agricultural crop may be evidence of reclamation, but it is not the only evidence that ought to be received, and ought not at any time to dispense with actual proof as to the character of the ditch, quantity of water, etc., owned by the claimant."

There is but little in the act by which the quality and character of the final proof can be regulated. Proof that water sufficient for the purposes of irrigation has been brought to the land seems to be all that was intended either from the act itself or the debates in Congress thereon.

The question then resolves itself into this form: What shall constitute "satisfactory proof" that water in sufficient quantity to effect permanent reclamation has been brought upon the land?

The act apparently rests on the presumption that the desert character of the land results from the absence of water and that reclamation will follow if water is brought upon the land; hence in the examination of final proof the presence of water by means of artificial irrigation should receive the first consideration. The quantity of water actually owned and controlled, the means provided for its proper distribution and the permanence of the supply are all to be considered in determining whether the land has been reclaimed "in the manner aforesaid." Proof that a crop has been successfully raised on land of former desert character should not be allowed to take the place of evidence as to the means and manner of irrigation, but received, when offered, as supplementing the same by showing the results thereof. Thus considered, proof of crops, becomes a proper element in final proof, though it should not be held as an essential requirement. The law gives the entryman three years within which to accomplish reclamation of the land and furnish satisfactory proof of the same, and to require a showing as to results within that period would be to materially shorten the time which is clearly granted by the statute.

Whether crops be shown or not, the final proof should be explicit on each essential point, with respect to the means of irrigation. The source and volume of the water supply, the carrying capacity of the ditches, and the number and length of all ditches on each legal subdivision should be specifically shown, the witnesses stating in full their means of knowledge and whether they at any time saw the land effectually irrigated, for without knowledge thus derived, the fact of reclamation remains a matter of conjecture.

In this case the final proof was only rejected on the ground that it did not show the production of a crop following the irrigation. An examination of the proof submitted herein leads me to the conclusion that it shows a sufficient quantity of water has been brought upon the land to effect reclamation, and that it should be accordingly accepted as satisfactory. This view of the law and the final proof required thereunder follows the departmental decision of the 1st instant in the case of George Ramsey (5 L. D., 120).

Your decision is therefore reversed.

PRE-EMPTION ENTRY—EXCESSIVE ACREAGE.

WILLIAM L. NYE.

The rule requiring an entry to approximate one hundred and sixty acres must be followed though the land has passed to a purchaser for a valuable consideration.

Acting Secretary Muldrow to Commissioner Sparks, September 14, 1886.

By letter of May 12, 1885, your office suspended the pre-emption cash entry of William L. Nye, made September 15, 1883, for the NW. $\frac{1}{4}$ of Sec. 4, T. 104 N., R. 57 W., Mitchell, Dakota, for excess in the area of the land, and required him to relinquish "at least one legal subdivision, which he may elect, retaining the land (contiguous in form) upon which his residence and principal improvements are situated."

From this action one Michael D. O'Brien alone files appeal, alleging that on September 12, 1884, he purchased said tract from said Nye in good faith, and paid therefor the sum of \$625, and that Nye now refuses to take an appeal. The entry in this case embraces 203.28 acres.

It is certain that under the established practice, the entryman may be required to relinquish a portion of his excessive entry, so that it may approximate 160 acres, while the final certificate remains in his hands. Benjamin C. Wilkins (2 L. D., 129), Charles Hoffman, 4 L. D., 92). This practice is based on the settled construction of the law, that this Department is not authorized to pass to patent an entry largely exceeding 160 acres. This being the case, I am of opinion that the assignee cannot stand in any better position than the entryman. In other words, the transfer cannot give this Department authority to confirm an entry not authorized by law. For this reason said decision is affirmed with this

modification, that the assignee O'Brien will be allowed sixty days within which to comply with the order thereof. Failing in this said entry will be canceled.

HOMESTEAD—RESIDENCE.

HENRY C. HANSBROUGH.

One holding the position of postmaster cannot be heard to say that his residence is beyond the delivery of his office.

Acting Secretary Muldrow to Commissioner Sparks, September 14, 1886.

I have examined the appeal of Henry C. Hansbrough from your office decision of January 11, 1885, holding for cancellation his homestead entry 129, and cash entry 854, for SE. $\frac{1}{4}$ of Sec. 28, T. 156, R. 64 W., Devils Lake, Dakota.

Claimant made entry February 9, 1884, and on November 7th following made commutation proof. His proof shows that he established residence May 8th; that his improvements consist of a house twelve by twenty feet, a barn, eight by twenty feet, an addition to his house, ten by twelve feet, sixteen acres broken and eight acres cultivated to crop one season. His family consists of himself and wife, and he says she has resided continuously on the claim. As to his absence from the land, claimant says: "I am postmaster at Devils Lake, and have been absent at times to attend to my official duties." The tract lies about twelve miles from the town of Devils Lake, and beyond the delivery of the post-office of that town. Section 3831 of the Revised Statutes provides that, "Every postmaster shall reside within the delivery of the office to which he is appointed." You find, and it is not denied, that claimant was appointed as postmaster on January 10, 1884, prior to the making of said homestead entry. He continued as such postmaster during his alleged residence on the tract. I am of opinion that a person holding a position of postmaster under the law as above quoted can not be heard to say that his residence is beyond the delivery of his office.

For this reason said decision is affirmed. The papers accompanying your office letter of September 12, 1885, are herewith returned.

PRIVATE CLAIM—RAILROAD GRANT.

PERKINS v. CENTRAL PAC. R. R. CO.

By the decisions of the Department the Higley Survey is now accepted as properly defining the boundaries of the Moraga claim.

As the reservation of this tract under the private claim of San Ramon terminated prior to the time when the right of the company attached, such reservation did not except the land from the railroad grant.

Acting Secretary Muldrow to Commissioner Sparks, September 14, 1886.

I have examined the case of Samuel A. Perkins v. the Central Pacific Railroad Company, on appeal by Perkins from your office decision of

March 19, 1884, rejecting his application to file pre-emption declaratory statement for lots 1, 2, 3 and 4 and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 3, T. 1 S., R. 2 W., M. D. M., San Francisco, California, on the ground of conflict with the claim of the company under its grant.

Appellant's application was presented at the local office September 25, 1878, with allegation of settlement July 1, 1878. The tract covered by said application is within the twenty miles limits of the grant of July 2, 1864, to the Central Pacific Railroad Company (13 Stat., 356), which amends and enlarges the grant by the act of July 1, 1862 (12 Stat., 492).

The grounds of appeal may be stated as follows:

1. That the tract in question was within the claimed limits of the Moraga rancho (Laguna de los Palos Colorados), and was reserved on account thereof until August 10, 1878, when the survey of said private grant, excluding this tract, was by decision of this Department finally confirmed.

2. That it was within the claimed limits of the rancho El Sobrante, and was on that account reserved until April 16, 1883, when by final decision of the Department, limiting the boundaries of said grant, it was excluded therefrom.

3. That it was up to September 7, 1865, within the exterior limits of the grant of San Ramon as claimed, and was reserved thereby until that date.

The claim is that any of the Mexican grants above mentioned worked a reservation of the tract so as to except it from the grant to the railroad.

As to the first claim, viz: that the land was reserved because within the claimed limits of the Moraga rancho, I find that it lies east of and outside of the limits of said claim.

My predecessor, Secretary Teller, having before him the question as to what were the exterior limits of the Moraga claim, decided in the case of Joel Docking (3 L. D., 204), that the Higley survey of said claim located substantially its exterior boundaries.

In that case it was stated that the northern, eastern and western boundaries were correctly represented by the Higley survey, but that the southern boundary which is described in the grant and confirmation as the establishment at San Jose, as located by said survey, seemed to be controverted.

He, however, held that said survey substantially located the southern boundary, as well as the other boundaries of the claim.

In the case of Rees v. Central Pacific Railroad Company, decided by me August 14th ultimo (5 L. D., 62), the question as to the boundaries of the Moraga claim again being brought before the Department for consideration, it was specifically held as to the southern boundary, a decision as to which was directly involved in that case, that it was correctly located by the Higley survey. As the southern boundary as delin-

eated by said survey seems to have been the only one about which there has been much doubt, and as that has been finally determined in the Rees case (*supra*), it may, I think, be regarded as definitely settled that the Higley survey as a matter of fact correctly delineated the eastern boundary of the Moraga rancho as claimed.

The tract in question is not embraced within the Higley survey, and was not within the claimed limits of the Moraga rancho.

I may say that notwithstanding past decisions as to what constituted the boundaries of said ranchos as claimed, the above conclusion has not been adopted in this case without a careful examination of the maps and diseños, together with other evidence bearing upon the question.

So far as the second ground of objection is concerned, viz, that the land was reserved and excepted from the railroad grant on account of the claim under the El Sobrante grant, this case is ruled in every particular by my decision in the Rees case (*cited supra*).

Under the doctrine of that case, the tract was never within the claimed limits of the Sobrante grant, but was, so far as it was concerned, public land at the date when the line of the road opposite said tract was definitely fixed, which in the decision cited is held to have been January 21, 1870, the date when the President accepted the map of constructed road on this section of its line, embracing 20.16 miles.

To the third objection, viz, that the land was reserved on account of the San Ramon grant, and therefore did not inure to the railroad under its grant, it is only necessary to say that it is not claimed that there was any reservation of the tract on account of said rancho at any time after September 7, 1865, the date of the final approval of the survey of the rancho by the United States circuit court, in order to arrive at the conclusion that the objection is without force.

Since the grant to the railroad did not become effective opposite this tract until January 21, 1870, the date of the acceptance of the map of constructed road, the reservation prior to September 7, 1865, as claimed, could not operate to except the land from the railroad grant. (Rees case, *supra*.)

It being clear that there was no reservation on account of any of the ranchos mentioned at the date when the grant took effect (January 21, 1870), and, so far as the record shows, that the tract was then public land, it follows that it passed to the company under its grant, and consequently that the application of Perkins to make pre-emption filing was properly rejected.

Your office decision is accordingly affirmed.

PRACTICE—APPEAL—SPECIFICATION OF ERRORS.

SCHWEITZER v. WOLFE.

An appeal will not be considered where no specification of errors is filed.

Acting Secretary Muldrow to Commissioner Sparks, September 17, 1886.

On January 2, 1884, Richard Wolfe made homestead entry of SE. $\frac{1}{4}$ of Sec. 9, T. 155 N., R. 63 W., Grand Forks, Dakota. On November 12, 1884, Lewis Schweitzer brought contest against the same for abandonment. On motion, the local officers dismissed the case and your office by letter of April 18, 1885, reinstated it. From this action Wolfe appeals. His appeal reads as follows: "Now comes Richard Wolfe who by his attorney John W. Maher hereby respectfully appeals from the decision of the Hon. Commissioner for the reason that said decision was contrary to law, and the practice of the Land Department." This appeal is defective in that it does not set forth any specification of error as required by Rule of Practice No. 88. For that reason said appeal is dismissed.

PRIVATE CLAIMS—INDEMNITY SCIP—SUCCESSION SALE.

LETTRIEUS ALRIO.

The judgment of a State court that would be received in the courts of the United States as conclusive, will be similarly accepted in this Department.

The purchaser of real estate at a succession sale is bound to look to the jurisdiction of the court and its order directing the sale, and if they are sufficient he is protected.

District courts of Louisiana have unlimited original jurisdiction in probate and succession matters and decrees rendered therein with respect to succession sales are conclusive as to all facts necessary to convey title.

The case of Joshua Garrett overruled.

Acting Secretary Muldrow to Commissioner Sparks, September 17, 1886.

By the third article of the treaty with Spain, of date February 22, 1819 (8 Stat., 252), the strip of territory in Louisiana, adjacent to Texas, and known as the "neutral territory," was finally ceded to the United States. Congress thereupon passed the acts of March 3, 1823 (3 Stat., 756), and May 26, 1824 (4 ib., 65), providing for the examination of the titles to the private land claims of the inhabitants of this territory. Pursuant to these laws the claims were divided into four classes, the third of which embraced the claims of actual settlers prior to the date of the treaty, which were not founded on any written title.

In the report of the register and receiver of the Southwestern District of Louisiana, dated at Opelousas, November 1, 1824, the claim of Lettrieus Alrio, 3d class, No. 137, among others, was recommended for confirmation (American State Papers, Green's Ed., Vol. 4, pp. 54 and

77). This claim was accordingly confirmed for six hundred and forty acres by the first section of the act of May 24, 1828 (6 Stat., 382); and by the *second* section of this act it was to be located under the direction of the register and receiver in conformity with the legal subdivisions of the public surveys, so far as practicable, including the improvements of the claimant.

A number of these third-class claims for six hundred and forty acres each, having been confirmed to actual settlers, all of whom were residing upon the same legal subdivision, it became impossible to locate all of them under the act of 1828; and, as no further provision had then been made by Congress for such cases, this claim of Alrio, along with some others, remains yet unlocated.

June 2, 1838, Congress passed an act (11 Stat., 294), the third section of which concludes as follows:

"That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States, subject to sale at a private entry at a price not exceeding one dollar and twenty-five cents per acre, *Provided*, That such location shall conform to legal divisions and subdivisions."

Under the provisions of this act the surveyor-general of Louisiana, on the 2d of November, 1876, issued certificates of location in this and other Rio Hondo claims, and transmitted the same to your office for authentication. The Alrio certificates were numbered 321 A to 321 H, inclusive, for eighty acres each—six hundred and forty acres—and were issued upon the application of Widow H. W. Reynolds, who asserted title thereto through a chain of conveyances commencing back in 1837, when it is alleged Alrio, through his attorney in fact, one William P. Jones, sold and conveyed his claim, with warranty, to Caleb Richardson Parker and Charles Gustavus Oehmichen.

This scrip being prepared upon the old printed form was returned to the surveyor-general, February 26, 1881, to be by him canceled; and by the same letter your office decided 1st, That the claim in question had never been located; and second, That the real owner thereof was entitled to indemnity scrip under the said act of 1858. In accordance with further instructions contained in this letter, the surveyor-general on the 9th of March, 1881, issued new certificates upon the engraved form; endorsing them in favor of Mrs. Reynolds, numbering them as before, and transmitted them for approval.

It appears by the proces verbal transmitted with the surveyor-general's letter of December 23, 1882, that the succession of Lettrious Alrio was opened in the district court for the Eleventh Judicial District of Louisiana, sitting as a court of probate in and for the parish of Natchitoches, on the 10th of August, 1882; that G. L. Trichel was appointed administrator thereof; that the usual proceedings in such matters as provided by the Civil Code of Louisiana were gone through with; and that on the 14th of September, 1882, at a public sale of the effects of this succession, the inchoate claim of Alrio was purchased for \$40 by A. E. Sompayrac, he being the last and highest bidder, etc., in whose favor the sheriff on the 16th of September executed and delivered the usual act of sale. Sompayrac thus became an applicant for the scrip already issued, and accordingly on February 24, 1883, by his attorney wrote your office, urging a decision as to whom the scrip belonged, and calling attention to certain defects in the chain of title by and through which Mrs. Reynolds claimed.

After considerable correspondence between Sompayrac and your office relative to the ownership of the scrip in question, the case was finally taken up, and on July 25, 1884, the decision was rendered from which the appeal of Sompayrac, now here for consideration, was taken (3 L. D., 44). This decision, after reciting a brief history of the case, denied the right of both Mrs. Reynolds and Sompayrac to receive the scrip theretofore issued. Mrs. Reynolds's application was denied, because from the evidence submitted it appeared that the power of attorney to Jones in 1837 had been executed by a female, *Letrius* Alrio, and not by the old settler, *Lettrious* Alrio, whose claim had been confirmed as aforesaid. It was further held in said decision that the presumptions of law favored the validity of said power of attorney; and that for that reason, and also because of the departmental ruling in the "Garrett" case (7 C. L. O., 55), in reference to succession sales in Louisiana, the claim of Sompayrac could not be recognized. This decision was understood to be final as to Sompayrac, but not as to Mrs. Reynolds, and she has not appealed from it.

The appeal of Sompayrac now before me and the argument in support of it are based upon two propositions, viz:

"I. The judgment of the court of the eleventh judicial district for the parish of Natchitoches, La., ordering a sale of the property of Lettrious Alrio, deceased, (it being a probate court and one of original general jurisdiction,) and the sale made in pursuance thereto, are binding upon the United States, unless impeached for fraud or annulled in some of the modes provided by law.

"II. The Commissioner of the General Land Office having adjudged that indemnity lands under the act of June 3, 1858, are due to Lettrious Alrio, or his legal representatives, it is his duty to deliver the same to A. E. Sompayrac as such legal representative, by virtue of the judgment and sale aforesaid, unless the right of Widow Henry W. Reynolds is superior in law or in equity."

These propositions will be considered in their order. And first as to the conclusiveness and binding force of the judgment of the district court of the parish of Natchitoches, in the matter of the succession of Lettricus Alrio.

The constitution of the United States provides that, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such records may be proved, and the effect thereof." (Art. IV, Sec. I). In execution of this express power conferred by the constitution, Congress passed the act of May 26, 1790 (1 Stat., 122), which provides in effect, That the judicial records in one State shall be proved in the tribunals of another, by the attestation of the clerk, under the seal of the court, with the certificate of the judge that the attestation is in due form. 2. That such records so authenticated shall have such faith and credit given to them in every other court of the United States, as they have by law or usage in the courts of the State from whence the said records were or shall be taken." In the construction of this act the Supreme Court of the United States has laid down the rule, That where the State court which rendered the judgment had jurisdiction, both of the *cause* and of the *parties*, such judgment is binding and conclusive everywhere in the courts of the United States, unless impeached for fraud. *Thompson v. Whitman* (18 Wall., 457), and cited cases. Upon principle, therefore, the same rule as to the conclusiveness of judgments should obtain in the executive departments of the United States as in the courts of the several States, or of the United States.

There has been no suggestion of fraud either on the part of *Sompayrac* or of the court which rendered the judgment; hence our inquiry must be restricted to the question of the jurisdiction of the district court for Natchitoches parish, in the State of Louisiana. The general rule in relation to this subject is: That where the court is one of general and unlimited jurisdiction its jurisdiction of the causes tried therein is always presumed, unless the contrary be shown. *Kempe's Lessee v. Kennedy* (5 Cranch, 173); *Dred Scott v. Sandford* (19 How., 401). In considering this question therefore, the constitution and powers of the court, in which this judgment was rendered must be inspected, in order that an intelligent conclusion may be arrived at.

As before stated, the proceedings in the matter of the Alrio succession were had in August and September, 1882. They were therefore under the State constitution of 1879.

Article 80 provides: "The *judicial power* shall be vested in a supreme court, in courts of appeal, in *district courts*, and in justices of the peace."

Article 107. "The State shall be divided into not less than twenty, nor more than thirty *judicial districts*, the parish of Orleans excepted."

Article 108: "The parishes of *Natchitoches* and *Sabine* shall compose the *eleventh* district.

Article 109: "District courts shall have original jurisdiction in all civil matters when the amount in dispute shall exceed fifty dollars, exclusive of interest. They shall have *unlimited original jurisdiction* in all criminal, *probate* and *succession matters*, and when a succession is a party defendant."

Article 872, Louisiana Civil Code declares: "Succession signifies also the estates, right and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property."

It is thus seen from the above quoted provisions of Louisiana law that the district court of the eleventh judicial district of Louisiana, sitting as a court of probates in and for Natchitoches parish, has original unlimited jurisdiction in probate and succession matters. Having assumed and exercised jurisdiction in the Alrio succession, the law will therefore presume that it did so rightfully. Having jurisdiction, it had a right to decide all questions arising in the cause, and its judgment not having been appealed from, and having not been annulled by direct action, is binding and conclusive in the courts of the United States, and also in its executive departments, unless want of jurisdiction over the *subject matter* can be affirmatively shown. *Harvey v. Tyler* (2 Wall., 328); *Florentine v. Burton* (ib., 210); and *Grignon v. Astor* (2 How., 319).

I pass to the second question raised by the appeal of Sompayrac.

It is conceded that the claim of Lettrieus Alrio has been confirmed, that it is yet unlocated, and that certificates of location under the act of 1858 are due to his legal representative. It thus becomes necessary, as a preliminary question, to determine which of the two applicants herein, if either of them, is such representative. This question must be determined by the laws of Louisiana. That is to say, the legal representative of the confirmee Lettrieus Alrio is he, who, under the laws of Louisiana, would be considered the owner of the claim. *Sims v. Irvine* (3 Dallas, 425, 457); *Waring v. Jackson* (1 Peters, 570); *Davis v. Mason* (ib., 503); *Miles v. Caldwell* (2 Wall., 35); and many other reported cases.

Now, what are the laws of Louisiana, and what are the rules as expounded by her courts, which are applicable to this question?

The record of the succession proceedings in the matter of this claim represents "that Lettrieus Alrio died intestate in the parish of Natchitoches, about the year 1850." His succession was then legally open and the place for disposing of his effects and settling up his estate was Natchitoches parish. Civil Code of Louisiana, Arts. 934 and 935.

It has been shown above that the court, a copy of whose record is here produced and relied upon, had "*unlimited original jurisdiction* in all criminal and *probate and succession matters*" in the parish of Natchitoches. It is further shown by the record that the Alrio succession had never

before been opened, either in the parish of Natchitoches or Sabine; that it was an unclaimed succession for over thirty years, and that the heirs were unknown and absent. This state of facts renders it what in the State of Louisiana is termed "*a vacant succession.*" Civil Code, Arts. 1095 and 1097.

The record further shows that the aforesaid administrator G. L. Trichel, appointed by the court to manage this succession, complied with the law as to notice, bond, oath, inventory, and appraisement of effects, and final sale of the property. Civil Code, Arts. 1114 and 1115.

Under Art. 1162, it is the duty of the court to sell the perishable movable property, even before the appointment of a curator. Art. 1163 "The curator is bound, in ten days after his appointment, to demand that all the remaining movable effects found in the succession intrusted to his administration be sold."

If there are debts against the estate, it is the duty of the curator to sell first the movables for their payment, if they be insufficient, he then sells enough immovables to pay them. Arts. 1164 to 1168. But under Arts. 1169 to 1189, he must, at the end of the year, convert all property into money, and pay the net proceeds to the Treasurer of the State.

The provisions of the Civil Code of Louisiana, relating to successions, have been for many years essentially as they exist to day. And for many years it has been considered a fundamental principle of law in that State that the purchaser of real estate at a succession sale is bound to look to the jurisdiction of the court and its order directing the sale, and if they are sufficient he is protected. This claim for scrip is in the nature of an incorporeal hereditament and is therefore descendible as realty. In the case of *Lalanne's Heirs v. Moreau* (13 La., 431), the heirs brought an action of ejectment against the purchasers at a succession sale of the real estate of their ancestor, relying upon several alleged nullities in the proceedings by which the property was sold, and had judgment in their favor below. The supreme court of Louisiana, on appeal, reversed the judgment below, and held, citing numerous authorities:

"Sales directed by the court of probates are judicial sales to all intents and purposes, and the purchaser is protected by the decree ordering them. * * * A purchaser under a decree of the orphans court is bound to look to the jurisdiction, but the truth of the record concerning matters within that jurisdiction can not be disputed. The decree of the court is to be received as conclusive evidence, not to be impeached from within, and like all other acts of the highest judicial authority, impeachable only from without; and a judgment, decree, sentence, or order, passed by a competent jurisdiction, which creates or changes a title, or any interest in an estate, is not only final as to the parties themselves, and all claiming under them, but furnishes conclusive evidence to all mankind, that the right or interest belongs to the party to whom the court adjudged it."

This doctrine was afterwards affirmed in *Beale et al. v. Walden* (11 Robinson, 67); again in *McCullough v. Minor* (2 La. An., 466); and in

Wright v. Cummings (19 ib., 353), which was a suit to test the validity of the title to certain real estate, acquired at a succession sale under the order of the court of probates, the court say :

“ It will not be necessary to examine objections taken to the proceedings prior to the date of the order of sale. A purchaser at a probate sale is not required to look beyond the decree recognizing its necessity.”

See also Sizemore v. Wedge (20 id., 124) ; Wisdom v. Buckner (31 id., 52) ; and Thompson v. Tolmie (2 Pet., 157).

A careful examination of the decisions just cited leads to the conclusion that in the courts of Louisiana the title of Sompayrac could not be questioned, unless it should be shown *affirmatively* that the district court in assuming to settle up the succession of Alrio was without jurisdiction as to the subject matter. As I have before shown, if such is the effect of this judgment in Louisiana, under the provisions of the United States constitution, above quoted, and the said act of 1790, such would be its effect in the United States courts and also in the executive departments of the government. That is to say, at the said succession sale in 1882 Sompayrac purchased the interest, right, and title to this claim of which Alrio died seized, and none other. In other words, he (Sompayrac) merely stands as the representative of Alrio and can claim nothing more than Alrio could were he alive.

Mrs. Reynolds's claim herein, as before stated, has as an initial point the alleged sale of this property by Alrio in 1837. Basing her claim as she does upon a private sale, it will be necessary for her to establish it by satisfactory evidence. If so established, then the scrip in question should be authenticated in her name; if not, then it should issue to Sompayrac. As already stated, your office has not rendered a final decision as to her claim. Questions relative to its validity are therefore not now before me for consideration, and no opinion is expressed concerning them.

I am aware that the conclusion herein arrived at, in reference to dignity of succession sales in Louisiana is at variance with that expressed by Mr. Secretary Schurz in the “Garrett” case, (*supra*), which has since been followed by this Department as a guide in such matters. But that was merely an opinion upon a state of facts certified by the Commissioner to be correct; and that opinion overruled that of the Commissioner, and also that of the U. S. District Attorney for Louisiana, who had investigated the subject thoroughly in the light of Louisiana law. (See Land Office Report for 1880, p. 195.) The error in the “Garrett” case consists in this that it requires the applicant for scrip who claims under a succession sale to show to this Department all the facts that he was required to show to the court which rendered a judgment in his favor. In other words, it in reality gives no force and effect to such judgment. This, as has been shown by the decisions of the courts before referred to, is clearly erroneous, and should not be allowed to obtain longer here. See also Comstock v. Crawford (3 Wall., 396).

Said "Garrett" case and all other cases in so far as they conflict with the views hereinbefore expressed are accordingly overruled.

The decision of your office upon the questions raised by the appeal of Sompayrac is hereby reversed, and the case is remanded to you that a final decision may be rendered by you in the matter of Mrs. Reynolds' alleged title, and for such further proceedings as may then be rendered necessary and proper in consonance with this decision.

SETTLERS ON RESTORED RAILROAD LANDS.

CIRCULAR.*

Commissioner Sparks to registers and receivers, April 30, 1886.

I have to call your attention to the following act of Congress:

AN ACT for the relief of certain settlers on restored railroad lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who shall have settled and made valuable and permanent improvements upon any odd-numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the preëmption, homestead, or timber-culture acts of the United States, shall be permitted at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same, by legal subdivisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor.

Approved January 13, 1881.

In accordance with the provisions of the foregoing act, you are instructed as follows:

1. The act applies to settlements upon odd-numbered sections embraced within railroad withdrawals, whether such settlements and withdrawals shall have been made before or after passage of the act.

2. In order to bring a purchaser within the provisions of the act, he must have actually settled and made valuable improvements upon the land.

3. The settlement and improvement must have been made before the restoration of the land to the public domain.

4. Such settlement and improvement must have been made in good faith and with the permission or license of the railroad company for whose benefit the withdrawal was made, and with the expectation of purchasing from said company the land so settled upon.

5. Only lands settled upon can be purchased under this act, and only the actual settler at the date of restoration can be permitted to make

* Omitted from IV L. D.

such purchase, and only land in withdrawn and restored odd-numbered sections, can be so purchased.

6. The act has no application to persons, who, without actual settlement, may have improved the land, nor to those, who, without actual settlement and improvement, may have purchased the land of the railroad company.

7. Only those persons are authorized to purchase under this act who are not entitled to enter the land under the preëmption, homestead, or timber-culture laws of the United States. When the land is subject to entry under any one of these laws, and the settler is qualified to make such entry, he is authorized to proceed under the law applicable to the case. He can have the benefit of this act only when he is excluded from the benefit of the general preëmption, homestead, or timber-culture laws. But, for example, if the land is not subject to timber-culture entry, and the party has exhausted his right to make a homestead or a preëmption entry, or is ineligible to such rights, he is allowed to purchase the land under this act. If he is qualified to make either a homestead, preëmption, or timber culture entry, and the land is subject to the entry he is qualified to make, then he is not allowed to make an entry under this act.

8. Claimants desiring to purchase under this act must make application in writing at the proper district land office within three months from the date of restoration as fixed by public notice; or, where lands have already been restored, within three months from the date of the receipt of these instructions at the local land office; and no final entry under the preëmption or homestead laws will be allowed upon such lands until after the expiration of said three months.

9. Entries under this act are restricted to one hundred and sixty acres each by legal subdivisions, and can include no land not embraced within the tract actually settled upon and improved. The tract, to the extent of one hundred and sixty acres, which was intended to be purchased of the railroad company, is the tract authorized to be purchased of the United States under the act, and other subdivisions of sections not included within such tract can not be taken to make up the quantity of one hundred and sixty acres when a less quantity was embraced within the limits of the land originally settled upon with the permission or license of the railroad company.

10. Every person applying to make entry under this act must make and subscribe the following affidavit.

I, ———, of ———, claiming the right to enter the ——— of section ———, township ———, range ———, under the provisions of the act of Congress approved January 13, 1881, entitled "An Act for the relief of certain settlers on restored railroad lands," do solemnly ——— that I was an actual settler on said tract at the time of the restoration thereof to the public domain of the United States, to wit, on the ——— day of ———, 18—. That prior to said time I had made valuable and permanent improvements on the land; that my settlement was made in good faith and with the permission or license of the ——— railroad company, and with the expectation of purchasing said land from said company; and that I am not entitled to enter, and acquire title to,

said land under the preëmption, homestead, or timber culture laws of the United States, for the reason that —, and that my improvements on said land at the date of the restoration thereof to the public domain consisted of —.

Sworn to and subscribed before me this — day of —, 188—.

11. The foregoing affidavit may be made before the register and receiver, or any officer authorized to administer oaths in the county in which the lands are situated. It must be supported by satisfactory evidence that the settlement was made with the permission or license of the railroad company, and with the expectation of purchasing the land from said company. The testimony of two competent witnesses will be required, showing that applicant's settlement was made prior to the restoration of the land, and stating the value and extent of his or her improvements.

12. The price of all lands purchased under this act is fixed at \$2.50 per acre. The price of all other lands within restoration limits, whether in odd or even-numbered sections, will be \$1.25 per acre, unless otherwise specially provided by law.

Approved:

L. Q. C. LAMAR,
Secretary.

DESERT LAND ENTRY—ASSIGNMENT.

HENRY W. FUSS.

Assignments of desert land entries made while the rule allowing the same was in force will be recognized, but not more than six hundred and forty acres may be thus acquired, and on final proof patent will issue in the name of the original entryman.

Secretary Lamar to Commissioner Sparks, September 24, 1886.

I have considered the appeal of Henry W. Fuss from your office decision of July 22, 1884, declining to accept final proof made by him upon desert land entries, Nos. 10 and 15, Carson City, Nevada, and holding the same for cancellation.

Briefly the facts relative to these entries are as follows:

The first mentioned (No. 10) was made April 18, 1877, by Henry G. Wingate, upon the W. $\frac{1}{2}$ of Sec. 12, T. 26 N., R. 31 E.

The other (No. 15) was made April 23, 1877, by John H. Thies, upon the E. $\frac{1}{2}$ of the same section, the two entries aggregating six hundred and forty acres.

Both the entrymen named made assignment of their claims, Wingate, under date of July 1, 1878, to Fuss directly, and Thies, under date April 8, 1878, to one Philip Steigelman, who subsequently, to wit, May 9, 1878, deeded to Fuss, the appellant.

On the 30th of March, 1880, Fuss, as assignee, made final proof on both entries, which proof was accepted by the register and receiver, whereupon Fuss made full payment for the land and received final certificate, setting forth that he was entitled to receive patents for the entire six hundred and forty acres.

Your office declined to accept the final proof and issue patent thereon, citing as authority for said action a departmental decision rendered April 15, 1880, in the case of S. W. Downey (7 C. L. O., 26), in which it was held that desert land claims are not assignable under existing law.

Subsequently, to wit, December 1, 1884, my predecessor, Secretary Teller, in the case of David B. Dole (3 L. D., 214,) while adhering to and reasserting the general rule laid down in the Downey case, (*supra*), restricted it so as to confine its operation to cases of assignment made subsequently to the rendition of said decision—April 15, 1880,—thus recognizing as valid all assignments made prior to said date; providing, however, that as title to no more than six hundred and forty acres can vest in any one person under the law, so not more than that quantity can be acquired by one person under an assignment, and further that when final proof is made by assignee the patent will issue in the name of the original entryman, and not in the name of the assignee.

I concur fully in the modification made as above indicated to the general rule, prohibiting assignments of desert land claims. It is most certainly equitable and just, and is, I think, founded in law and good practice, as will more fully appear from the following facts:

The desert land act (19 Stat., 377,) was approved March 3, 1877.

On the 12th of the same month, your office issued circular instructions (4 C. L. O., 23), requiring local officers, after proof of the desert character of the land, the filing of the proper declaration, and the payment of a certain sum of money, to issue a certificate to the declarant, stating, among other things, that if within three years therefrom said declarant, "or his assignee or legal representatives," should reclaim the land as required by the act, and pay an additional sum of money, "he or they" should be entitled to a patent for the land.

They also provided that "At any time within three years after the date of filing the declaration and the issue of certificate, *the proper party* may make satisfactory proof of having conducted water upon the land applied for." Thus, within a few days after the passage of the desert land act, your office recognized the right of assignment under said act, and by formal announcement made provision for those cases in which it should be found that assignment had been made.

The practice thus initiated stood without interruption until April 15, 1880, the date of the decision by the Department in the Downey case (*supra*).

An examination of the act itself develops nothing which in terms either authorizes or prohibits assignments.

Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment; but being a matter of construction, or more correctly speaking of administrative policy, and a question which has been involved in some doubt, as would appear from the fact that the rule has been changed, the regulation of your office which recognized the right of assignment had, until revoked or overruled, the force and effect of law, so that rights acquired and valid thereunder should be protected. *Minor v. Marriott*, (2 L. D., 709); *Robb's Lessee v. Irwin* (15 Ohio, 703); *Ohio Life and Trust Co. v. Debolt* (16th How., 432); *Gelpcke v. City of Dubuque* (1 Wall., 206). It was so revoked and a different rule, growing out of a change of interpretation, was established April 15, 1880. Prior to that time the assignees had not only been recognized, but, by the regulations and blank forms issued by your office thereunder, had, in effect, been invited to become such. Assignments of desert land claims to any one assignee, embracing in the aggregate no more than six hundred and forty acres, regularly made prior to that date, should therefore be recognized, and the proof of assignees, when satisfactory in other respects, should be accepted to the extent indicated, patent to issue in the name of the original entryman.

As stated in the opening recital of the facts in this case, appellant came into possession of the lands in question by assignment duly made in 1878. The certificate of original entry, given by the register and receiver, on the back of which the assignment in each case was made, contains a clause providing for the recognition of an assignee. The cases presented by this appeal, falling within the exception to the rule now in force prohibiting assignments, your office decision is reversed.

As the question of validity of assignment is the only one before me on appeal, I do not pass upon the merits of the case as to the sufficiency of the proof submitted, but leave that for adjudication by your office in due course of business. It was accepted by the local officers, who issued final certificate and took appellant's money nearly five and a half years ago.

PRACTICE—APPEAL—NOTICE.

AUGUST BERGER.

Notice of appeal and specification of errors must be served upon the opposite party, and in the absence of such service the appeal will be dismissed.

Acting Secretary Muldrow to Commissioner Sparks, September 25, 1886.

On June 8, 1885, your office held the timber culture entry of August Berger, for the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 26, T. 103 N., R. 25 W., Worthington, Minnesota, for cancellation, on the ground that said tract had passed to the State under the swamp grant.

From this action of your office Berger appealed, but as notice of appeal and specification of errors was not served on the State as required by Rule 93 of Practice, you held the appeal defective, and acting under Rule 82 allowed the entryman fifteen days within which to cure the defect. On report from the local office that Berger had failed to amend his appeal, after due notice of such requirement, you transmit for my action the said appeal of Berger as originally filed by him.

The appeal is fatally defective under Rule 93, and is therefore dismissed.

CANCELLATION OF ENTRY—RIGHT OF TRANSFEREE.

UNITED STATES *v.* COPELAND ET AL.

As the special agents' report, on which the order of cancellation was based, disclosed a transfer of the land after the issuance of final certificate, such transferees should have been notified of said order.

Acting Secretary Muldrow to Commissioner Sparks, September 25, 1886.

I have considered the case of the United States *v.* Florence L. Copeland and John Waldoek, transferee, involving Osage cash entry No. 1007 of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 28, T. 27 S., R. 12 W., made March 31, 1883, at the Larned land office, State of Kansas.

On August 31, 1883, your office canceled said entry upon the report of a special agent of your office, and allowed the claimant sixty days within which to show cause why said entry should be re-instated. No application for re instatement of said entry was filed by Miss Copeland.

On November 21, 1884, the district land officers rejected the pre-emption declaratory statement of Ransom S. Bowers for said tracts, and on appeal your office, on January 3, 1885, held that as Miss Copeland has failed to show cause why her said entry should be re-instated, although duly notified of the decision of your office canceling the same, the land in question became subject to entry by the first legal applicant, and the local land officers were directed to receive Bowers's filing as of the date when presented.

On June 30, 1885, your office returned the application for a writ of certiorari, and an appeal from said decision of June 2d, filed by the attorneys of said Waldoek, upon the ground that the appellant was not a proper party in the case, and had no standing in his own right.

On July 20, 1885 (4 L. D., 31), this Department considered the application for certification and the affidavits submitted in support thereof by the attorneys of said Waldoek, and directed your office to certify to the Department all of the papers in said case, and to suspend all action relative to the filing of said Bowers, or the allowance of proof by him, and in the event that he has been allowed to make entry of said land,

the same should be suspended until further advised by this Department.

It appears from the report of said special agent that Miss Copeland admitted under oath that she never complied with the requirements of the law as to residence and settlement; that she entered said tract under a contract with said Waldoek, and had conveyed said land to him by warranty deed, dated April 7, 1883, and that she and the witnesses to the final proof were not sworn by the clerk of the court before whom the proof was made.

Waldoek has filed several affidavits denying the truth of these allegations, and insists that he can show that the entryman has complied with the law in good faith, and that Miss Copeland has been induced to make the said admissions by malicious persons, to deprive the transferee of said land, upon which he has placed valuable improvements.

It is quite evident that said entry should not have been canceled upon said agent's report. The *Le Cocq* cases (2 L. D. 784); *George T. Burns* (4 L. D., 62); *William Johnson* (*ibid.*, 397).

There can be no question that under the decisions of the supreme court of the United States and the rulings of this Department, when the entryman has fully complied with the requirements of the law and received the certificates of entry, he can dispose of the land covered by his entry. *Myers v. Croft* (13 Wall., 291); *C. P. Cogswell* (3 L. D., 23). And when the entryman has sold the land covered by his entry and the entry is attacked for fraud or illegality, the entryman and his transferee are entitled to a hearing before the proper tribunal to defend, and the burden of proof is upon the party attacking the entry. *John C. Featherspil* (4 L. D., 570); *Henry C. Putnam* (5 L. D., 22).

In the case at bar the special agent's report discloses the fact that Miss Copeland had sold and conveyed her interest in said land, and the deed for the same was of record and constructive notice to everybody. Waldoek was entitled to notice of the decision canceling said entry. The statements of witnesses, who, after having disposed of the land covered by their entries, deny the truth of their former sworn statements are not entitled to much weight, and should be carefully considered. The affidavits presented appear to be sufficient to warrant an investigation of the allegations contained therein, and you will accordingly direct the local land officers to order a hearing, under the rules of practice, to determine the validity of said entry and the good faith of all parties in interest. It is suggested that a special agent of your office be present, if practicable, to represent the United States. Bowers's filing and proof will remain suspended to await the result of the investigation. Upon the receipt of the testimony and the opinion of the district land officers thereon, you will re-adjudicate the case.

ADJOINING FARM ENTRY—ACT OF MAY 14, 1880.

HALL v. DEARTH.

The right to make an adjoining farm entry is not enlarged or modified by section 3 of the act of May 14, 1880.

The general requirements of the homestead law as to residence are not waived by the provisions of said section, though credit is given therein for residence prior to entry.

Secretary Lamar to Commissioner Sparks, September 27, 1886.

I have considered the appeal of M. W. Hall from your office decision of February 23, 1884, rejecting his application to make adjoining farm entry of lots 1 and 2 of Sec. 12, T. 1 S., R. 2 W., M. D. M., San Francisco, California.

It appears that Jacob Dearth made soldier's additional homestead entry for the tract July 30, 1878, on which final certificate, No. 1846, issued.

June 27, 1883, Hall, the appellant, made his application to enter the tract as an adjoining farm homestead. Accompanying his application was his sworn statement that he owned and resided upon an original farm, containing 102.96 acres, which comprised a part of the San Ramon rancho, and that he had resided upon said original farm since July, 1871, and had used the land applied for in connection therewith. His application was refused by the local office, for the reason that the tract covered thereby had been finally entered by Dearth as an additional homestead. On appeal from that decision, Hall claimed that he was protected by section 3 of the act of May 14, 1880, and had the superior right to the tract by virtue of his settlement in 1871. The settlement claimed was the cultivation of the tract while he resided on his original farm.

Your office, in accordance with its previous practice, ruled that the right of a claimant to an adjoining farm does not relate back to the date of settlement on the original farm, under the act of May 14, 1880, and therefore approved the rejection of Hall's claim. I concur in that ruling.

The last clause of section 2289 of the Revised Statutes relating to homestead rights provides that—

“Every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.”

Under this provision appellant would probably have had a good claim had the land applied for not been covered by an entry at the date of his application.

I do not regard the act of May, 1880, as at all applicable to adjoining farm entries or claims. Section three of that act provides that—

“Any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead

laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the pre-emption laws."

The manifest purpose of Congress in enacting the law last above quoted was to protect settlers who had gone upon public land with the intention of establishing a home thereon, and who in pursuance of that object had established a residence and made valuable improvements, but who, because the land had not been surveyed, or for any other reason, had been prevented from making homestead entry prior to such settlement.

The general homestead law requires of an applicant seeking to enter thereunder that he make affidavit that his entry is made for the purpose of actual settlement and cultivation; and when he comes to make final proof he must show a residence of five years, except when credit is given for military service.

It is not in my judgment intended by the act of May, 1880, to waive any of the requirements of the homestead law as to residence, but only to give credit for residence prior to entry. Appellant's residence was not upon the tract in question, but was upon an adjoining tract, which he owned. His allegation that although living upon his original farm he, by virtue of cultivation and improvement of the tract in dispute prior to his application to enter the same, acquired a preferred right thereto as a homestead settler, is therefore without foundation in the law invoked.

His claim must consequently rest upon the provision of law contained in Section 2289 of the Revised Statutes already quoted, and unless sustained thereby must fall. But that provision has reference to unappropriated public lands, while the facts show that this tract had been entered and final certificate had issued before Hall offered his application to enter.

Your office decision rejecting said application is affirmed.

TIMBER CULTURE—ONE ENTRY IN A SECTION.

TURI O. SIMLE.

Though two timber culture entries cannot be made in the same section the second entry herein is held intact, it having been made subsequent to the allowance of a cash entry covering the land included within the timber culture entry first of record.

Secretary Lamar to Commissioner Sparks, September 27, 1886.

I have considered the appeal of Turi O. Simle from the decision of your office, dated April 21, 1885, holding for cancellation his timber culture entry, No. 4442, of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 12, T. 151 N., R. 58 W., made October 14, 1884, at the Grand Forks land office, Dakota Territory.

Said entry was held for cancellation because of the prior timber culture entry No. 3421 of the NW. $\frac{1}{4}$ of said Sec. 12, made January 17, 1884, at the same office, by Thomas Ulven.

The record shows that Mary Hanson filed her pre-emption declaratory statement No. 7554 for the NW. $\frac{1}{4}$ of said section on January 30, 1884, alleging settlement thereon November 22, 1883. On August 11, 1884, after due notice, in which said Ulven was specially cited to show cause why her entry should not be allowed, Miss Hanson offered her final proof and payment, which was accepted by the district land officers, and cash certificate 10,462 was issued for said tract.

It is insisted by the appellant that the settlement and filing of Miss Hanson, having been made prior to the entry of Ulven, and her final proof and payment having been received and cash entry allowed, prior to the entry of Simle, the entry of Ulven was in effect canceled, and there was no obstacle to the allowance of Simle's entry.

It is quite evident that a timber culture entry segregates the land covered thereby so long as it remains uncanceled, and that two timber-culture entries cannot be allowed of record at the same time within the same section. (20 Stat., 113).

It is clear that Ulven's entry was made subject to the right of Miss Hanson, and if she failed to make final proof within the time prescribed by law, the timber culture entryman would be permitted to show compliance with the law. *Lunney v. Darnell* (2 L. D., 593).

But Ulven failed to respond when cited by Miss Hanson, upon making her final proof, and the cash entry was allowed prior to the timber culture entry of Simle. If Miss Hanson's entry is confirmed, then it is quite sure that Ulven's entry must be canceled, and in that event there does not seem to be any good reason why Simle's entry should not remain intact. See *Richard Griffiths* (2 L. D., 256); *Shurtleff v. Kelley et al.* (4 L. D., 448).

The decision of your office is therefore modified, and you will cause the entry papers of Miss Hanson to be examined in due course of business, and, if there is no valid objection to the same, her entry will be approved. Ulven's said entry will be canceled and Simle's said entry will remain intact.

HEARING ON SPECIAL AGENTS' REPORT—RES JUDICATA.

ROBERT HALL ET AL.

The issuance of final certificate on the direction of the Commissioner of the General Land Office will not preclude his successor from ordering a hearing as to the merits of the claim while it is yet pending in his office.

Secretary Lamar to Commissioner Sparks, September 27, 1886.

I have before me an application for certiorari in the matter of proceedings had in the pre-emption entries of Robert Hall, Thaddeus Ellis and Frederick A. McFarlin, of certain lands in sections 11 and 14, T. 130 N., R. 62 W., Fargo, Dakota.

From the application and exhibits furnished therewith, it appears that these entries are based on filings made in March and April 1883. That when final proof was offered action thereon was suspended on account of an adverse report of a special agent to the effect that the pre-emption claims were made in the interest of other parties, but that after some delay during which time no further evidence was secured against the validity of said claims your predecessor directed the local office to accept the final proof and issue certificates thereon, and that such action was accordingly had in October 1884.

Thereafter and while said entries were pending in your office, a second report of said special agent was submitted to the same effect as before, whereupon your office, by letters of March 12th and 15th, 1886, held said entries for cancellation and gave the claimants sixty days within which to show cause why the entries should be sustained.

May 22, 1886, appeals were filed in said cases, but your office by its decision of July 14, 1886, refused to allow the appeals, and ordered hearings instead, grounding such action on the departmental letter of July 6, 1886 (5 L. D., 149) wherein it was said that "in all cases coming to your office hereafter where entries have been held for cancellation on agents' reports, and the parties notified that they will be allowed the right of appeal, you are directed to order hearings in compliance with the amended circular, instead of transmitting the cases on appeal to the Department." See circular of July 31, 1885 (4 L. D., 503), and amendment thereto of May 24, 1886 (ib., 545).

This application was then filed on behalf of the entrymen and certain others alleging an interest in the matters involved as assignees, it being urged in support thereof that (1) under Rule 81 of Practice the appellants were entitled to be heard as such when the appeals were filed; (2) that these cases were not properly included within the terms of the order of July 6, 1886; (3) that said order of July 6th is retrospective and unjust in depriving parties of rights involved in issues then pending and ready for final action; and (4) it is also urged that your decision should be reviewed, as the appeal therefrom raised the point that the cases were *res judicata* by virtue of the action of your predecessor in directing the acceptance of final proof.

The three points of exception first alleged are fully met when it is observed that the appeal which was refused was from an order to "show cause why the entries should be sustained." In other words, an opportunity was thereby granted to have all matters pertaining to the validity of said entries fully tested before the proper tribunal, and if said cases were properly pending in your office for its action, the order for such investigation was within your discretion, subject only to review under application for certiorari. But it is said that the cases were *res judicata* on all issues raised by the said reports of the special agent. This position however is not well taken. The cases were before your office for action on the final proof which your predecessor had directed

the local office to receive, but patent had not yet issued on such final proof, and while thus under consideration, the jurisdiction of your office to institute inquiry into the nature of the claim was undoubted, and the manner of its exercise deprived no one of his rights, or opportunity to be fairly heard.

The application is therefore denied.

PRE-EMPTION CONTEST—FINAL PROOF

BAILEY v. TOWNSEND.

A contest against a pre-emption claim should not be permitted before offer to make final proof therefor.

Final proof should not be submitted during the pendency of a contest, though the same was prematurely allowed.

Secretary Lamar to Commissioner Sparks, September 27, 1886.

I have considered the case of Charles A. Bailey v. Winfield P. Townsend, as presented by the appeal of the latter from the decision of your office, dated June 4, 1885, rejecting his final proof for Lots 3, 4, and 5, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 6, T. 30 N., R. 22 W., Valentine land district, Nebraska.

The record shows that on November 28, 1883, Bailey filed his soldier's homestead declaratory statement for said land, and on April 22, 1884, made homestead entry No. 1344 of the same.

On February 8, 1884, Townsend filed his pre-emption declaratory statement No. 770 for said tracts, alleging settlement thereon October 31, 1883. On May 19, 1884, Bailey filed his affidavit of contest against said filing, alleging that Townsend commenced settlement and improvement upon said land on or about June 1, 1883; that he did not make said settlement in good faith, but for the purpose of speculation, and that he failed to file his pre-emption declaratory statement until after the expiration of three months from his date of settlement, and until after the filing of the soldier's homestead declaratory statement by said Bailey.

Notice issued charging Townsend with "abandoning his pre-emption filing and failing to file in time," and July 1st was fixed for the hearing of the case.

On May 20, 1884, Townsend gave due notice of his intention to make final proof before the county judge of Brown County, in said State, on July 2d ensuing. Bailey was not specially cited in said notice, and did not appear at the time said proof was made, but filed his protest against the same, alleging substantially the same reasons as those contained in his contest affidavit. The register made the following indorsement

upon the final proof: "This tract being under contest, approval is withheld till contest is decided." Townsend did not appear at said contest, alleging as a reason that he could not make his final proof at one place and attend the contest at another place a considerable distance away. At the hearing counsel for Townsend filed a plea denying that he had abandoned his pre-emption filing, or failed to file in time; and also alleging that the notice does not show that contestant is an adverse claimant. After the hearing had commenced, counsel for Townsend made a motion to dismiss said contest, which motion was overruled by the district land officers.

Upon the testimony submitted the register and receiver rendered their joint opinion that Townsend failed to file his declaratory statement within the time required by law; that the evidence fails to show the good faith of Townsend, and that his filing should be canceled. On appeal your office, without passing specially upon the alleged irregularities in the record, affirmed the decision of the local land officers.

It is clear that said contest was commenced prematurely. Bailey should have waited until Townsend gave notice of his intention to make his final proof. *Nichols v. Benoit* (2 L. D. 583); *Percival v. Doheney* (4 L. D., 134). Although the contest was prematurely commenced, yet, having been allowed and the day set for hearing, Townsend should not have been permitted to make his final proof until said contest had been determined. *Stroud v. De Wolf* (4 L. D., 394).

The published notice failed to cite Townsend to appear, and the notice of contest failed to charge any bad faith on the part of Townsend. Townsend was only called upon to answer the charge of abandonment and a failure to file in time, and his counsel strenuously objected to the evidence outside of the charges contained in the contest notice. It has been held by this Department that the evidence must follow the charges as laid in the notice. *Shinnes v. Bates* (4 L. D., 424). Townsend offered affidavits tending to show that he sent his declaratory statement to the local land office and the same was received prior to the expiration of the three months from the date of his alleged settlement.

While these affidavits could not properly be considered by the local land officers as evidence, yet, in view of the many irregularities and errors as shown in the record, I am of the opinion that the final proof of Townsend should be rejected, the contest of Bailey should be dismissed without prejudice, and Townsend should be permitted to make new proof after giving due notice, citing Bailey specially. (See instructions, November 25, 1884, 3 L. D., 196.)

The decision of your office is modified accordingly.

FINAL PROOF—CROSS-EXAMINATION OF WITNESSES.

CIRCULAR.

Commissioner Sparks to registers and receivers, September 23, 1886.

Your attention is called to the circular of December 15, 1885 (4 L. D., 297), regarding cross-examination of claimants and witnesses in final proofs. Claimants and witnesses must be cross-examined in all cases of final proof; and you are instructed to reject all proofs not accompanied with the required cross-examination.

The paper containing the record of the cross-examination for transmission to this office must show that the statements therein have been sworn to and subscribed by the witnesses, by their signatures appearing thereon, and the jurats of the officers administering the oaths, the same as in the formal proofs made on the regular printed blanks.

Approved:

L. Q. C. LAMAR,
Secretary.

BOUNTY LAND WARRANTS.

CIRCULAR.

Washington, D. C., September 24, 1886.

To whom it may concern:

The practice of examining and certifying military bounty land warrants, in advance of offer to locate, as free from objections on the records, and the assignments thereof as sufficient in form, is hereby discontinued. There is no such duty imposed on the Commissioner by law, but it is a matter entirely within his discretion, (Secretary Thompson's decision of August 9, 1858, Lester, vol. 1, p. 619), and he finds that time cannot be spared from imperative duties for this gratuitous business. In future, he will pass upon the status of bounty land warrants, and the assignments thereof, as he does upon other official matters, not in advance, but when they come regularly before him for action, in disposing of warrant locations reported by the district land officers, or appeals by interested parties from decisions of the same officers, refusing to permit locations.

Warrants now on file, or any that may hereafter be filed, for certification, will be returned to the parties forwarding them, with information of the foregoing action.

WM. A. J. SPARKS,
Commissioner.

Approved:

L. Q. C. LAMAR,
Secretary.

COMMUTED HOMESTEAD ENTRY—RESIDENCE.

WILLIAM M. PENROSE.

To acquire residence under the homestead law the former residence must be abandoned, and such change can be effected only by the concurrent act and intention of the settler.

Secretary Lamar to Commissioner Sparks, September 28, 1886.

On August 27, 1883, William A. Penrose made homestead entry for the SW. $\frac{1}{4}$ of Sec. 4, T. 117 N., R. 68 W., Huron, Dakota, and on June 10, 1884, commuted the same to cash entry. His proof shows that for many years prior to making entry he resided in Illinois; that his family consists of his wife and two children; that he left his family in Illinois—his wife being employed in “keeping boarders”—went to Dakota, made entry, built a house eight by twelve feet, dug a well, and broke eight acres of land; that he “resided” on the tract from March 12, 1883, to September 13th following; that he then returned to Illinois, where he remained during the winter; that he again went to Dakota in March, 1884, visited the land for a short time, sowed five acres in oats, went away and returned in June, when he made final proof and paid for the land. As shown by supplemental affidavits required by your office, he then returned to Illinois, where he is now living with his family, and professes no intention of returning to his claim. He alleges that poverty prevented him from bringing his family to the land, and contends that his “residence” as above described was a full compliance with the law in that particular. Your office held for cancellation his cash entry, and allowed the homestead entry to stand subject to proof of compliance with law. On a careful examination of the case I am satisfied that as a matter of fact, his poverty did not prevent his compliance with the law. That defense is inconsistent with the facts in the case. His claim that he has complied with the law is untenable. To acquire residence on a tract of land under the homestead law the former residence must be abandoned. Such change can be effected only when the act of the settler and his intention to make such change unite. In the present case the alleged residence of claimant is wanting in both essential particulars. His residence was never changed from Illinois and I find as a fact that he never had an intention of changing it. The fact that his family remained during all this time at their home in Illinois is conclusive of that question, under the circumstances of this case. Finally I am of opinion that claimant has attempted to acquire title to a portion of the public lands, without compliance with law. His entries will therefore be canceled. Said decision is accordingly modified.

HOMESTEAD—TOWNSITE SETTLEMENT.

MATTHIESSEN & WARD v. WILLIAMS. (On Review.)

An informal townsite settlement prior to survey, and subsequently abandoned, does not reserve the land from homestead entry.

Secretary Lamar to Commissioner Sparks, September 28, 1886.

On the 17th of July, 1884, my immediate predecessor rendered a decision affirming that of your office, dated February 1st preceding, in the case of Franz O. Matthiessen and Lebbeus B. Ward v. Joseph T. Williams, involving the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 33, T. 8 N., R. 50 E., Eureka, Nevada. (10 C. L. O., 356, and 3 L. D., 282). This case relates to the contest of Williams's homestead entry No. 69 of the land above described; and the material facts therein so far as necessary for the purpose of this review are as follows: Williams made his homestead entry December 2, 1875, and submitted his final proof October 24, 1882, at which last date contest was initiated against him by one Richard Gluyas, as attorney in fact for Matthiessen and Ward, who claimed certain rights and interests in the property in controversy, more particularly described hereafter. Four grounds were set up as reasons why the entry of Williams should be canceled.

First, That Williams had, contrary to law, conveyed, or agreed to convey a portion of the land to one M. M. Donahue.

Second, That he had conveyed, or agreed to convey, a portion of said land to one Lafayette Joslyn.

Third, That the land was not, on December 2, 1875, when Williams made his entry, subject to such entry, by reason of the fact that on that day the land was within the limits of and formed the site of a town.

Fourth, That said land was, on December 2, 1875, actually settled and occupied for the puposes of trade and business, and therefore not subject to entry under the homestead law.

These contestants and Joslyn also had previously applied to purchase the land under the second section of the act of June 15, 1880.

Hearing was had, testimony taken, and the judgment of the local office, of your office, and also of this Department was adverse to the contestants upon all the points raised in the contest, the said applications to purchase under the act of June 15, 1880, were likewise denied, and the land was awarded to Williams under his homestead entry by my predecessor's said decision of July 17, 1884.

A motion for review and reconsideration having been filed by the contestants, my predecessor, on December 6, 1884, rendered a decision in the words following, to wit:

"I have before me a motion for the review of my decision in the case of Matthiessen and Ward v. Williams, and for a rehearing on allegations of fraud in respect of Williams's entry.

"The motion for review I for the present do not discuss. The motion for rehearing is based on alleged newly discovered evidence, which contestee contends is not newly discovered and hence, not ground for a re-

hearing. In the view I take of the case it is immaterial whether or not said evidence is newly discovered. The issue is not on the superior right of the parties to the land, but solely on Williams's alleged fraudulent attempt to acquire it; the question is between him and the Government, and at whatever time a *prima facie* case of fraud is presented the Land Department is in duty bound to consider it.

"In this case I am of opinion that a hearing should be had for the purpose of fully inquiring into all the questions raised by the record relative to the tract of land involved, and you will so order."

A subsequent order of the Secretary to your office, dated February 5, 1885, is as follows:

"In the matter of the contest of Messrs. Matthiessen and Ward *v.* Joseph T. Williams a question having arisen as to two points, I hereby add to said order the following paragraph explanatory of them.

"As said hearing is required chiefly for the purpose of further enlightening this Department on the issues raised, and is to be held pending a motion for review already made, you are advised that no further decision by your office or the local office is contemplated and that the new evidence, together with the former record, is to be forwarded promptly through your office to this Department. Depositions which have heretofore been regularly put in evidence are of course not required to be re-offered, and *ex parte* affidavits which have been filed in the case will not be considered, unless the facts therein alleged are regularly put in evidence."

Pursuant to these orders a rehearing was had, and a great amount of testimony taken, all of which has been carefully considered in connection with the motion for review in the case.

The material charges upon which this rehearing was ordered and upon which testimony was taken are substantially the same as those in the original contest. And from a careful examination of the whole record, I think it apparent that the material facts in the case remain the same.

Much testimony was introduced at the rehearing going to show that Williams was not one of the first settlers on this land, that he had nothing to do with the selection of the "Townsite of Lower Hot Creek," and that he never invited settlers to occupy lands in that valley, as stated in the decision complained of. But in the view I take of this case it makes no substantial difference whether he was one of the original settlers on this land in 1866, as is claimed on his behalf, or whether, as is admitted by the contestants, he came into possession of the main part of the land in controversy by purchase of the possessory right to the same about the year 1870, some five years prior to the survey of the township. It is certain that his home has been in some part of the Hot Creek cañon since the year 1866, and that he has had various and considerable business interests there all that time. It is shown that in the year 1866 certain persons went into the Hot Creek valley and, flushed with the belief that vast mineral resources there existed, conceived the idea of building a town. To this end a site of about two acres was selected and divided up into lots, which were given to those who would build thereon. Business such as is found in a mining town

was carried on to some extent, two saloons were opened, a post-office was established, a hotel and some boarding houses were put into operation, and the "Lower town of Hot Creek" began its existence. But the mining excitement was of short duration, business of most kinds soon ceased, the miners removed to other and more profitable regions until at last no semblance of the town remained.

Much testimony has been introduced touching the number of inhabitants of this "town" in December, 1875, when Williams made his homestead entry. But the weight of it when considered in connection with that submitted on the original hearing in the case only tends to confirm the opinion formerly arrived at. It may be true that this so-called town then contained some ten or twelve people or possibly a few more. But what of it? It is not believed that the majority of them were more-than transient miners. It is quite evident to my mind that if the so-called town of Hot Creek ever advanced beyond the dignity of a mining camp, it lost all appearance of a town very soon thereafter. Joslyn remained there until 1880. His staying there is probably accounted for by reason of this place being on a stage route and thus a convenient stopping place for travelers in that country. His "trade and business" consisted in retailing whisky, tobacco, cigars, and cards. It is conceded on all hands that this "town" was never incorporated, and that no claim under the townsite laws was ever made or filed in the local office by any of its inhabitants. Since 1880 there have been but two persons there, viz: Gluyas, who came in 1879, and a Chinaman.

The mere fact that a small tract of land was selected as the site of a prospective town in 1866, nine years before the public surveys were made, did not forever withdraw it from entry under the pre-emption and homestead laws. Neither was "the trade and business" which was carried on there such as is contemplated in the statute as exempting land used for such purpose from pre-emption and homestead entry. This selection having been abandoned and no one having disputed the possession or ownership of Williams until about the time he offered final proof, I fail to see any fraud upon his part as charged against him. I think the best evidence that the alleged townsite had been abandoned as such when Williams made his entry is the fact that not one of the people then staying there ever laid claim to any part of this land under the townsite laws.

Williams made his entry as he had a right to do of land that he had been residing upon long prior to the township surveys, and in making it necessarily made it conform to the subdivisional lines of such surveys. No one who was then occupying any part of the land in controversy remained to contest his rights to it when he offered his final proof, and there appears to be no valid objection on this score to the allowance of his entry.

Much testimony has also been introduced with reference to the pre-emption claim of one H. B. Campbell, which adjoins the land here in

controversy, and upon which patent has issued. But I am unable to see that this cuts any figure in the case now under consideration. The pre-emption claim of Campbell is not now undergoing investigation, and all that may be said concerning it is foreign to the case before me.

With reference to the remaining charges upon which the rehearing was ordered nothing new has been developed. The facts as found from the testimony adduced at this rehearing are substantially the same as those found by my predecessor in his said decision of July 17, 1884. Such being the case, I cannot conceive that any good purpose can be subserved by a further discussion of them. In fact, it may be said that by far the major part of the vast amount of testimony taken at this rehearing either has nothing to do with this case, or is merely cumulative of the testimony previously introduced, and treats of matters which appear to have been very carefully and thoroughly considered by my predecessor when he rendered the decision herein complained of.

The motion for review is accordingly denied. It goes without saying that the recent application of Joslyn made June 21st last to purchase part of this land under the second section of the act of June 15, 1880, which is in the nature of a renewal of his former application made October 20, 1882, is also denied.

REVIEW DENIED.

JOHN C. TURPEN.

The motion filed herein for review of the departmental decision of July 31, 1886 (5 L. D., 25) was denied by Secretary Lamar, September 28, 1886.

CONTESTANT—PREFERENCE RIGHT OF ENTRY.

WALKER v. MACK.

The thirty days accorded to the successful contestant within which to make entry begins to run from the receipt of notice of cancellation.

Secretary Lamar to Commissioner Sparks, September 28, 1886.

In the case of Daniel Mack v. A. T. Gregory, involving the latter's homestead entry for the NW. $\frac{1}{4}$ of Sec. 28, T. 4 S., R. 24, W., Kirwin, Kansas, the local officers, on August 29, 1884, decided in favor of contestant. No appeal was taken and the papers were duly forwarded. On January 7, 1885, John Walker filed relinquishment of Gregory's entry, and made homestead entry of the tract. By letter of April 7th following, your office approved the finding of the local officers on the contest and awarded contestant the preference right of entry. On February 18, 1885, Mack made homestead entry of the tract by virtue of his preference right. Your office, being advised of this fact, by letter of June 3, 1885, held for cancellation the entry of Walker for conflict

with that of Mack. From this action Walker appeals, alleging that the entry having been canceled on January 7th, the presumption is that the successful contestant was on that day notified of the cancellation, and that therefore his entry should have been made on or before February 7, 1885.

This contention is set at rest by the letter of the register of April 13, 1885, stating that Mack made his entry "within the thirty days allowed to make entry as the preferred claimant." This fact is not denied by appellant. While it may be true that officers are presumed to perform their duties promptly, the successful contestant is entitled to thirty days from the receipt of notice in which to exercise his preference right.

Said decision is accordingly affirmed.

HOMESTEAD ENTRY—WIDOWS' RIGHT.

DILLIVAN v. SNYDER.

A widow may make in her own right a homestead entry, though at such time holding land covered by the homestead entry of her deceased husband upon which final proof has not been made.

Secretary Lamar to Commissioner Sparks, September 30, 1886.

I have considered the case of Mrs. Lizzie Dillivan *v.* A. Snyder as presented by the appeal of the latter from the decision of your office dated May 14, 1885, holding for cancellation his homestead entry No. 19,379 of the SW. $\frac{1}{4}$ of Sec. 31, T. 8 S., R. 17 W., made March 4, 1885, at the Kirwin land office, Kansas.

The sole question presented by the record is, whether Mrs. Dillivan was a qualified settler upon the land in controversy on March 3, 1884, and so remained up to the date of her application to make homestead entry of said tract. It is insisted by the appellant that Mrs. Dillivan is not a qualified applicant under the homestead law, because she was holding land covered by the homestead entry of her deceased husband at the time she claims settlement upon the lands in controversy.

The local land officers and your office hold that, even if the allegation be true, Mrs. Dillivan was not disqualified from making a homestead entry in her own right, citing the case of Adolphine Hedenskay (2 C. L. L., 442). In the case of Tauer *v.* Heirs of Walter A. Mann (4 L. D., 433) this Department held, on March 13, 1886, that the widow of a deceased homestead entryman who has complied with the law up to the date of his death, is not required to reside on the land, but may by continued cultivation thereof, for the remainder of the period, complete the claim and receive patent therefor.

Since Mrs. Dillivan was not required to reside upon the land covered by the homestead entry made by her husband in his lifetime, I am of the opinion that she was a qualified applicant for the land in dispute and has the prior right thereto. The decision of your office is accordingly affirmed.

RES JUDICATA—SUIT TO VACATE PATENT.

HENRY A. PRATT ET AL.

By the judgment not only of the Department, but the courts also, the matters involved herein are *res judicata*; and suit to set aside patents resting on such conclusive adjudication will not be advised.

OPINION.

Assistant Attorney-General Montgomery to Secretary Lamar, October 9, 1886.

I have examined the questions of law and fact involved in the application of Henry A. Pratt, Charles Bales, John Carr and Carleton W. Doyle, asking for an order vacating orders of cancellation of certain cash entries, for the re-instatement of said entries, and for the issuance to petitioners of United States patents for the lands covered thereby; and, as the result of such examination, I beg leave to report as follows, to wit:

In view of previous judicial decisions, both State and federal, and departmental rulings, touching the same land now in controversy, I deem it useless to consider the merits of said application further than is necessary to determine whether or not a correct application of the doctrine of *res judicata* will necessarily deprive the Department of further jurisdiction in the premises.

The land in question is described as section 24, township 3 south, range 2 east, Mount Diablo Meridian, in the land district of San Francisco, State of California.

More than twenty years ago the State of California selected said section as lieu land, to go towards making good her deficiency of 16th and 36th sections of school lands, lost in place. Said State afterwards sold said section to one Socrates Huff and others, under whom the present holders claim title. Subsequently to said selection by the State, the moving parties in the present proceedings, to wit: Pratt, Bales, Carr and Doyle, each sought to acquire a pre-emption right to one quarter of said section. This gave rise to a series of lawsuits, in which the contending parties have had the relative merits of their respective claims finally adjudicated.

In the case of Huff *v.* Doyle *et al.*, decided by the supreme court of the United States at its October term, 1866 (93 U. S., 558), it was decided that the same land, now "in controversy was rightfully certified to the State by the land officers, and that the title of plaintiff (claiming under the State) is perfect."

In rendering said decision, the court decided, in effect, that the adverse claim then asserted (being the very same that is *now* asserted) by said C. W. Doyle was *invalid*. So that unless the Secretary of the Interior is clothed with power to review and reverse the decisions of

the supreme court, I am at a loss to know by what authority he can give validity to a pre-emption filing, which under the decision of said court is void.

It is true that in an affidavit by one of the learned counsel, who ask for the re-instatement of said Doyle's pre-emption entry, it is alleged:

"That the supreme court of the United States was grossly imposed upon and deceived by the stipulations entered into by and between the attorneys who presented the case, and in consequence whereof the court adjudged the claim of the State and its pretended purchaser to be the superior title."

Even if this were clearly shown to be so, still I know of no supervisory jurisdiction in the Secretary of the Interior empowering him to review and annul the decisions of the supreme court of the United States. It would be the assertion of a doctrine, both startling and strange, to maintain that the Secretary of the Interior—an executive officer of the government—could in any case interpose his authority to shield a litigant against the consequences of a judgment rendered against him by the highest court known to our constitution. But such a doctrine would be doubly startling and doubly strange when applied to a case such as this is alleged to be, where the judgment complained of was procured by the joint stipulation of the attorneys representing both sides of the case.

But not only must the Secretary reverse a decision of the supreme court, in order to re-instate and validate said entries, but he must go farther and annul a decision of his own predecessor, touching these same entries, made nearly nine years ago, and ever since acted upon and acquiesced in, not only by the Department, but by the very parties themselves, who are now seeking for such annulment.

On the 29th day of September, 1877, Secretary Schurz decided against Mr. C. W. Doyle and Mr. Charles Bales substantially the same application which they are now seeking to have decided in their favor. The following are the words of that decision:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., September 29, 1877.

SIR: Referring to my letter of the 28th of July last, in relation to the E. $\frac{1}{2}$ of section 24, township 3 south, range 2 east, San Francisco, California, I have to inform you that I have considered the argument submitted by the counsel for C. W. Doyle and Chas. Bales, claimants for said tract, urging the revocation of my order of June 5th last, for the cancellation of their cash entries. The claim of the State was originally rejected by your office and this department upon the ground that the first section of the act of July 23, 1866, did not confirm the prior selection of the land made by the State, and for that reason the cash entries of Doyle and Bales were allowed, but before patents issued the supreme court of the United States after full consideration of the same point rendered a different decision, and adjudged that the tract in controversy was rightfully certified to the State, and that the title of the

State purchaser was perfect. Notwithstanding this decision of the highest judicial tribunal of the country, the attorney for the pre-emptors requests that a patent issue to them for land the title to which is thus adjudged to be in another.

The proposition is not consistent with a correct administration of the law, and cannot be entertained. By law this department is invested with the control of all matters pertaining to the disposal of public lands, and that control is only terminated by the issue of patent. If it is found that an entry has been erroneously allowed, it is the duty of the department to cancel the same. Under the ruling of the court it is evident that said entries were erroneously allowed, and they should be treated accordingly. All questions of title must now be determined before a tribunal other than this department, and I can take no action that would in effect interfere with the judgment of the court. The application for patents is denied, and the case will be considered closed. The papers are herewith transmitted.

Very respectfully,

C. SCHURZ, *Secretary.*

To the COMMISSIONER OF THE GENERAL LAND OFFICE.

In rendering the above decision, the Hon. Secretary was simply making his own ruling conform to the law as expounded by the supreme court.

In 1881, in the case of *H. A. Pratt v. H. F. Crane* (58 Cal., 533) the supreme court of the State of California, upon the authority of said case of *Huff v. Doyle* and in accordance with the above quoted ruling of this Department, sustained the title of said defendant Crane to that portion of said section 24, which is now claimed by Pratt, and adjudged said claim of Pratt to be invalid. And at the ensuing term of the same supreme court, the same land to which John Carr is now seeking to establish a title was adjudged to be the property of said H. F. Crane, who at that time held and still holds adversely to the claim of said Carr. See *Carr v. Crane*, (59 Cal., 302).

So that the title which the Secretary is now asked to overturn rests upon no less a foundation than the concurring judgment of a former Secretary of the Interior, the judgment of the supreme court of the State of California, and the judgment of the supreme court of the United States.

The re-instatement of said canceled entries, not only requires a power in one Secretary upon the showing above indicated to annul the long-standing and long-acquiesced in adjudications of his predecessors, but it requires, as already suggested, a power to set aside the most solemn adjudications of our highest judicial tribunals, both State and Federal.

Inasmuch as I know of no law to warrant any such an extraordinary stretch of power by the Secretary, I am forced to the conclusion that the said application should be denied.

It seems, however, that in anticipation of the foregoing conclusion, the attorneys for applicants have suggested that, in the event of the Secretary's refusal to order a re-instatement of the canceled entries as

prayed for by them, he recommend the Department of Justice to institute suits to annul the patents under which the present owners of said land derive their title. In order for the Secretary to make such a recommendation it will be necessary for him not only to adjudge erroneous the entire series of adjudications just referred to, but to over-ride and to ask the court to over ride in toto the whole doctrine of *res judicata*, and thus establish a precedent, which, if acted upon and generally followed, would tend to make a mockery of justice, and to destroy all faith in the stability of property titles, whether resting upon Departmental decisions or upon the solemn adjudications of our highest courts, both State and Federal. It therefore seems clear to my mind that such a recommendation as that asked for should be denied.

All of which is respectfully submitted.

DECISION.

Secretary Lamar to Commissioner Sparks.

I concur in the foregoing opinion, and the motion for an order to vacate the orders of cancellation of the cash entries therein referred to; to reinstate said entries; and for the issuance of patents for the lands covered thereby, is hereby denied; as well as the alternate motion that the Department of Justice be requested to cause the institution of suits to vacate said patents.

RIGHT OF PRE-EMPTION—DECLARATORY STATEMENT.

FIDELER *v.* KURTH.

The right of a pre-emption settler, who did not file within the statutory period, is not defeated by the entry of an intervening homesteader who has failed to comply with the law.

Secretary Lamar to Commissioner Sparks, October 12, 1886.

On July 1, 1879, Charles Kurth made homestead entry for the NE. $\frac{1}{4}$ of Sec. 14, T. 102, R. 55, Yankton, now Mitchell, Dakota. On February 11, 1882, Peter Fidler filed declaratory statement for the same tract, alleging settlement June 20, 1879. On March 20, 1882, he gave notice of his intention to offer proof, and on April 24th, the day set for making said proof, Kurth filed protest, on the ground that Fidler had not made settlement on the date alleged, and also applied to purchase under the act of June 15, 1880. Final proof was offered by Fidler, and additional testimony submitted by both parties. The local officers, on July 26, 1882, held that Kurth had sold all his right in the premises to Fidler and recommended that the "proof of pre-emption claimant be received."

Your office, by letter of May 7, 1883, reversed said decision, allowed Kurth to purchase under the act of June 15, 1880, and held for cancellation the declaratory statement of Fiderer. The cash entry of Kurth was then made of record. On appeal this Department, by letter of July 25, 1884, ordered a new hearing, with a view of ascertaining the exact date of Fiderer's settlement, and the truth of the allegation that Kurth had sold his rights to Fiderer.

The second hearing was had, and on February 12, 1885, the local officers held that Fiderer settled between June 23 and July 1, 1879, and further that, "It is evident that Kurth's present claim is an afterthought. He agreed to sell and did sell his interest in the premises to Fiderer, and received his price therefor." They again recommended that judgment be rendered for Fiderer, and that Kurth's "filing" be canceled. On appeal your office, by letter of May 7, 1885, affirmed that decision, held for cancellation the cash entry of Kurth, and allowed Fiderer to enter the tract upon the proof already made, and further found that Kurth has never made settlement upon the tract, established residence, or attempted to comply with the requirements of the homestead law. In these conclusions of your office I concur, and also in the finding of the local officers that Fiderer settled about June 23, 1879. In that view of the case it became necessary for him to file his declaratory statement by September 23d following, or take the risk of forfeiting his claim in favor of the next settler in order of time who had complied with the law. (United States R. S., Sec. 2265.) He failed to so file until February 11, 1882, and in the meantime the homestead entry of Kurth was made of record. After the time allowed by law to Fiderer to put his claim of record, Kurth applied to purchase under the act of June 15, 1880, his application was allowed, and he claims that Fiderer's right to the tract is now at an end.

In the case of *Freise v. Hobson* (4 L. D., 580), it was held by this Department that the right of purchase under said act was suspended from the initiation of a contest until the final disposition thereof. The proceedings in the case at bar were in the nature of a contest, inasmuch as they must determine the priority of right to the land, as between the parties thereto. I am therefore of the opinion that the reason for the rule announced in said case applies with equal force to the case at bar. Consequently, the application of Kurth should have been suspended to await the final disposition of the questions involved. It being now determined that Fiderer had the prior right, the application of Kurth is rejected. The homestead entry not being followed by residence will be canceled. Said decision is affirmed, for the reasons herein stated.

FEES OF SURVEYORS-GENERAL.

CIRCULAR.

Commissioner Sparks to surveyors-general, October 13, 1886.

Surveyors-general will be permitted to furnish certified copies of field-notes, plats, and other papers from their records and to charge therefor such fees as are now allowed by law to registers and receivers, or to public officials in the state or territory for like services, not exceeding the fees prescribed for registers and receivers, and provided also, that such services are not performed in office hours by clerks paid by the United States, nor the government stationery or supplies used.

Approved:

L. Q. C. LAMAR,
Secretary.

MINING CLAIM—MILL SITE.

CHARLES LENNIG.

Both a water right and mill site claim may be located on the same tract of land. Section 2337, R. S., contemplates the actual use, or occupation by improvements or otherwise, for mining or milling purposes, of the land; and it is not satisfied by the use for said purposes of the water from springs situated thereon.

Secretary Lamar to Commissioner Sparks, October 14, 1886.

I have considered the case of Charles Lennig, applicant for patent for the Eureka Mill Site, mineral entry No. 71, Prescott land district, Arizona, on appeal from your decision of February 18, 1886, holding said entry for cancellation.

The appeal purports to have been taken for the United Verde Copper Company, who show no interest whatever in the claim; but since your said decision appears to have recognized them as probably interested, I will waive this informality and treat the appeal as that of Lennig, the claimant of record.

It appears from the record before me that said mill site claim was filed February 18, 1882, in connection with a claim for the Eureka Lode, new mineral entry No. 70, under Section 2337 of the Revised Statutes. It further appears, and your said decision finds, that said mill site claim is situated about a mile from said lode claim, and is variously and commonly known as "Walnut Springs," "Ruffner's Springs," "Eureka Water Site," and "Eureka Mill Site;" that it contains the only springs within six miles of the Eureka lode, and was purchased by Lennig "for the purpose of obtaining the requisite water for mining purposes on the Eureka mine," and is described in the deed of conveyance as "that certain water right and water privilege;" and that the only evidence of

improvement on the land is a ditch for conveying water, and the only use of it shown has been the use of the water on the Eureka lode claim. From these facts said decision concludes that "it is clear that title to the property is sought chiefly, if not solely, as a water right and to control the springs in question," and that "the claimant has not shown such *use or occupation* of the *land* in question as is contemplated by Section 2337, R. S." And said decision holds that because this Department has ruled in the Pagosa Springs Case (1 L. D., 573), and in the case of Walter A. Chessman (2 L. D., 774), that "a water right cannot as such be patented under the mining laws,"—and because Sections 2339 and 2340, R. S., recognize and provide for the acquisition of "rights to the use of water for mining or other purposes" by possession and use,—they cannot be construed as authorizing the issue of patent in such cases as that now under consideration.

The Pagosa Springs and Chessman cases, above cited, appear to have no application to the question raised by this case; the former rules that land is not patentable as mineral land because it contains a mineral spring, and the latter that land used for storing water may not be patented as placer land. In this case the record tends to show that a water right in the springs on the Eureka mill site, and a right of way over the public domain for the ditches leading therefrom to the Eureka lode, has vested in Mr. Lennig. These rights are acquired by priority of appropriation and are governed by local customs and laws (*Broder v. Natoma Water Co.*, 101 U. S., 274), they are amply protected by the provisions of Sections 2339 and 2340, R. S., and I concur in your view that they are not patentable as water rights or rights of way. But it does not follow, from the fact that water rights are not patentable as such, that land containing water, in which a water right may be acquired, may not be patented as a mill site. The presence of water on the land often must be, and doubtless was in the case now before me, the chief reason for its selection as a mill site. I infer from the statement of the court in *O'Keeffe v. Cunningham* (9 Cal., 589), that the customs and laws in mining regions sanction the location of a tract of land both for water rights, or rights of way for ditches, and for mining purposes. It is entirely consistent with the United States laws, as I read them, that a tract of land may be covered by the water right of one person and by the settlement, mining, or mill site claim of another person. Hence it must follow, as there is no express prohibition of it in the statutes, that a tract of land may be subject to both the water right and the mill site claim of the same person. And therefore the ownership of the Eureka water right does not bar Mr. Lennig's claim to the Eureka Mill Site, if he is otherwise within the terms of Section 2337, R. S., which reads as follows:

"Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and in-

cluded in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section."

The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction-works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill-site." They make the use or occupation of it for mining or milling purposes the only pre-requisite to a patent. The proprietor of a lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz mill or reduction-works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz-mill, I think it clear that he would be *using* it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.

In the case at bar the record shows that the land is suitable for milling purposes, because it lies on the banks of a creek and also contains springs which supply an abundance of water. It was originally located "as a mill site or place upon which to erect a mill, furnace, or other works necessary for the reduction of ores from the Eureka mines or other mines in this district;" and the application now on file sets forth that it is "claimed by the said applicant as and for a mill site for the working of the ores from said mining claim." But in fact it has never been used or occupied for any such purpose. On the contrary, it appears that the said water is used in running a "*smelter located on the Eureka mine,*" and that it is conveyed in pipes some two miles for that purpose. These facts show plainly that the land is not used or occupied for the purpose for which it was located, or for any purpose in connection with mining or milling. The use of the *water* is, in my judgment, not a use of the *land*.

I therefore affirm your decision.

RAILROAD LANDS RESTORED TO ENTRY.

NORTHERN PAC. R. R. CO.

Lands in Walla Walla land district, Washington Territory, withdrawn on the line of amended general route filed by the Northern Pacific Railroad Company, February 21, 1872, lying south of the territory affected by the definite location of said road, and east of the line showing the forty mile limit of that point of the route not yet definitely located, are restored to settlement and entry.

Acting Secretary Muldrow to Commissioner Sparks, October 18, 1886.

By letter of September 13, 1886, your office recommended that certain lands in the Walla Walla land district, Washington Territory, now withdrawn for the benefit of the Northern Pacific Railroad Company (13 Stat., 365), be restored to settlement and entry.

The lands referred to were within the limits of withdrawal ordered November 21, 1870, on map filed August 13, 1870, as map of general route. This route was afterwards changed, and a new map, filed as map of amended general route, was accepted February 21, 1872, and the withdrawal made thereon also embraced said lands.

On October 4, 1880, the map of definite location was filed on a still different line, and by this location the lands in question fell entirely outside the forty mile limits. But inasmuch as those lands lay within the withdrawal on the amended general route, their status, as affected by definite location, could not be ascertained until the southern terminal limit on definite location was fixed. Said terminal limit was fixed on August 16, 1881, and the lands in question fell outside and south of that line. The lands lie south of the territory affected by the definite location and east of the line showing the forty mile limit of that part of the road not yet definitely located. There seems to be no reason therefore why they should longer remain withdrawn, and indeed might have been restored in 1881 when other lands similarly situated were restored. I accordingly concur in said recommendation, and said lands will be restored to entry and settlement.

RAILROAD GRANT—MINERAL LANDS.

SAMUEL W. SPONG.

The statutory exception of mineral lands from the grant to this company, is construed to include only lands known to contain valuable minerals prior to the issuance of the patent.

Secretary Lamar to Commissioner Sparks, October 21, 1886.

I have examined the appeal of Samuel W. Spong from the decision of your office, dated December 23, 1882, refusing to allow him to file mineral application for the Marble Valley Quartz mine, lot No. 39, in Sec. 17, T. 9 N., R. 9 E., M. D. M., Sacramento land district, California.

The record shows that said application was made to the local land officers and refused by them on December 2, 1882, for the reason that said section was patented to the Central Pacific Railroad Company on the 27th day of June, 1867. Your office on appeal affirmed said decision, upon the ground that the exception in the grant to said company and in said patent is construed to mean lands *known* to contain valuable minerals prior to the issuing of the patent, and that subsequent discoveries would not affect the title of the company to the lands and mines subsequently discovered.

The section embracing said lot is designated by an odd number within the limits of the grant made by the act of Congress approved July 1, 1862 (12 Stat., 489), and amended by the act approved July 2, 1864 (13 Stat., 356), to said railroad company. In section three of the act of July 1, 1862, it is provided that "all mineral lands shall be excepted from the operation of this act;" and in section four of the amendatory act it is provided that "the term mineral land . . . shall not be construed to include coal and iron land."

It is strenuously insisted by counsel for the appellant, that Congress did not grant mineral lands to said company; that said patent, although including said section in terms, did not operate as a conveyance of the title to any land that may at any time be found to be mineral. It is not denied that said section was returned as agricultural by the United States surveyor; that it was regularly patented to said company, without fraud or mistake on the part of the land officers or said company, so far as is shown by the record. The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent.

It has been repeatedly held by the supreme court of the United States that a patent executed in the required form and by the proper officers for such a portion of the public domain as is by law subject to sale or other disposal passes the title thereto, and the finding of the facts by the Land Department which authorizes its issue is conclusive in a court of law and can not be collaterally assailed. *Steel v. Smelting Company* (106 U. S., 447).

In the case of *Smelting Company v. Kemp* (104 U. S., 636-641), the same court say, "It is this unassailable character of the patent which gives to it its chief, indeed its only, value as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation."

In the case of *McLaughlin v. United States* (107 U. S., 527), the court affirmed the decree of the circuit court canceling a patent issued

to said company, on the ground that the tract in question, at the time of the grant, was known to be mineral land by the appellant, and that, therefore, the patent was issued by inadvertence and mistake without authority of law. In the opinion of the court the inquiry is made, "Suppose that when such land has been conveyed by the government it is afterwards discovered that it contains valuable deposits of the precious metals unknown to the patentee or to the officers of the government at the time of the conveyance, will such subsequent discovery enable the government to sustain a suit to set aside the patent or the grant? If so, what are the rights of innocent purchasers from the grantee and what limitations exist upon the exercise of the government's right?"

The court, however, declined to give any answer to said inquiries.

In the case of *Deffeback v. Hawke* (115 U. S., 393), the court reviewed and commented on the several acts of Congress relative to the disposition of mineral lands, and held that the officers of the Land Department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed, and that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper, can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands.

In said opinion the court say: "We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterward, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

In the case of *Merrill v. Dixon* (15 Nev., 405), the supreme court of Nevada, commenting upon the issuance of patents to railroad companies, containing the clause excluding mineral lands, should any such be found to exist in the tracts described in the patents, said: "For the purposes of this case, we shall consider that all mineral lands which were intended by Congress to be excluded and excepted from the operation of the grant to the railroad company were excluded and excepted by the patent conveying the lands to the said company."

To the same effect is the decision of the United States circuit court for the District of California, in the case of the *Pacific Coast Mining and Milling Company v. Spargo et al.*, reported in 8 Sawyer, 645.

While the exception of mineral lands from the grant to said company is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that Congress intended to grant only such lands which may after the lapse of an indefinite number of years prove to be agricultural in character.

A careful examination of the whole record shows no error in the decision appealed from, and it is accordingly affirmed.

HOMESTEAD ENTRY—SINGLE WOMAN.

MARIA GOOD.

The right acquired by the original homestead entry of a single woman is not affected by her marriage prior to final proof.

Secretary Lamar to Commissioner Sparks, October 22, 1886.

I have considered the appeal of Maria Good, *nee* Wilcox, from your decision, dated July 14, 1886, holding for cancellation her homestead entry, No. 15,552. Said entry, it appears, was made September 28, 1880, and covers the NE. $\frac{1}{4}$ of Sec. 22, T. 3 S., R. 23 W., Kirwin, Kansas. November 7, 1885, claimant made final proof before the clerk of the district court, which proof was on the 11th of the same month rejected by the local office "because of insufficient residence."

From that action appeal was taken to your office.

Your decision sets out the following facts as shown by the record in the case, to wit, that claimant was a native born citizen of the United States and a single woman over twenty-one years of age at date of entry, soon after which she married; that her husband was a mechanic and worked in Norton, three miles distant; that claimant's statements are that she staid in Norton during the bad weather in winter, aside from which she resided continuously on the land; that the testimony of her witnesses make it appear that she staid in Norton winters and on the homestead summers; that she was never absent for more than three months at a time; that she has never moved her household goods from the land, and that the improvements, which are valued at \$600, consist of a house, a well, wind-mill, sheds, an orchard of one hundred and twenty-eight trees, and fifteen acres under cultivation. Without passing upon the question of residence further than to say that "the testimony as to residence is not very clear, except that it was established in November, 1880," your decision proceeds to rule the case upon the fact of the marriage of appellant after having made her entry.

On this question you hold that "a woman who makes a homestead entry and subsequently marries before completing the same, forfeits her right thereby to acquire title to the land," and for that reason you dismiss the appeal from the action of the local office and hold the entry for cancellation.

Section 2289 of the Revised Statutes contains the following provisions as to who may enter public lands under the homestead laws:

"Every person who is the head of a family, or who has arrived at the age of twenty one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or a less quantity, of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre," &c.

Your decision tacitly admits that the applicant, as a single woman, over twenty-one years of age, and native born, was at the date of her entry qualified under the law quoted to make said entry.

The sole question before me for consideration, therefore, is, whether the fact of her marriage after entry and before final proof of itself worked a forfeiture of such rights as she acquired by her entry.

I am unable to concur in the conclusion arrived at by you on this proposition. The original homestead act of May 20, 1862, was entitled "An Act to secure Homesteads to *actual settlers* on the Public Domain." That act, which is substantially embodied in the Revised Statutes—Sec. 2289, *et seq.*,—prescribed certain prerequisite qualifications which must exist in settlers under that law. Those qualifications have already been mentioned. If found to exist, then what?

Actual continuous residence and cultivation must follow, and no certificate shall be given or patent issued until the expiration of five years from date of entry, and then, or within two years thereafter, proof may be made showing continuous residence and cultivation, and that no part of the tract with reference to which the proof is offered has been alienated, except as provided in section twenty-two hundred and eighty-eight of the Revised Statutes. (2291, R. S.)

From the foregoing it seems clear that when once legal qualification to make homestead entry is established, and the land applied for is subject to such entry, then the only remaining questions for the Land Department to consider are those relative to residence, cultivation and alienation.

This being true, the fact of the marriage of the claimant in this case after she made her entry can not of itself work a forfeiture of any right which she may have acquired by virtue of said entry.

It only remains for her to show compliance with the positive requirements of the homestead law, which are conditions subsequent, in order to entitle her to full legal title by patent. Her marriage did not of necessity prevent her remaining upon and improving the tract. The marriage of a woman who has made homestead entry may result in her leaving the land which she has entered and establishing a residence elsewhere, and thus indirectly furnish a reason for forfeiture, but the ground of forfeiture in such case would be abandonment and not the fact of marriage. I am clearly of the opinion that the fact of Maria

Good's marriage did not in any degree impair the right which she acquired under her entry.

Upon reference to the decisions of your office on the question here involved, I find that the practice has, so far as I have been able to discover, heretofore been uniform in recognizing the right of a married woman to complete a homestead claim, initiated by entry before marriage.

On the 10th of February, 1874, your office, in passing upon this question, ruled that a single woman who makes an entry under the homestead laws "does not forfeit her rights under the homestead laws by marriage, provided she fulfils the requirements of the statute as regards settlement and cultivation of the land embraced in her homestead entry." (1 C. L. O. 3). See also the following cases: Mary Latt, decided by your office August 25, 1877 (4 C. L. O., 103); Eda M. Carnochan, decided September 29, 1881 (8 C. L. O., 121); Herman L. Phelps, decided January 9, 1883 (9 C. L. O., 196). In the case of Rossanna Kennedy (10 C. L. O., 152) my predecessor, Secretary Kirkwood, having under consideration the effect of a pre-emption entry and discussing the difference between that and a homestead entry, held, as to a homestead entry, that "the marriage of a single woman subsequent to her entry is not a waiver or forfeiture of her rights." Believing, as I do, that the practice as indicated by the decisions cited has been in accordance with the law, and that appellant by her marriage lost no right acquired through her homestead entry, I must reverse your decision.

I do not pass upon the proof made as to residence and cultivation, as that has not been acted upon by your office.

APPLICATION TO ENTER—POST OFFICE ADDRESS—RESIDENCE.

CIRCULAR.

Commissioner Sparks to registers and receivers, October 25, 1886.

The returns from many district land offices show that the regulations of this office requiring applicants under the homestead, pre-emption, timber culture, and other laws, to state in their applications the place of their *actual residence* and their *post-office addresses* are not being satisfactorily complied with, particularly in cases in which residence upon the land or residence within the State or Territory is not required.

It is often impossible, and in timber-culture, desert land, and timber land entries especially so, to ascertain from the papers in the case the place of residence of claimants, and personal service of notice cannot be obtained, for this reason, in many cases in which it is important that personal service should be had. Necessary *investigations* are also seriously impeded for want of this essential information.

You will hereafter see, in all cases, that the place of the *actual* residence and *post-office addresses* of applicants are properly stated in their applications. It is not sufficient to state that the place of residence is in a certain *county*. If the residence is in a town or city the same must be stated, and if in a *city*, the *street and number* must be given. If the residence of the applicant is in the country in any of the public land States or Territories, the section, township, and range upon which applicant resides must be given.

You will not hereafter receive timber-culture, desert land, or other applications in which this requirement is not complied with, but all such applications will be returned for correction to the parties presenting or transmitting the same, and will not be placed on record until the omission is supplied.

Applicants will also be advised that changes of residence subsequent to allowance of application must be reported to the local officers, and, when so advised of such change of residence you will make proper note of the same.

In connection with the above, you are directed to hereafter note upon the paper itself, in case of *every filing, declaration, or application*, (where the same is not executed before you and presented by the applicant *in person*), the name of the party *by whom* the same was presented or transmitted.

You will strictly enforce the foregoing.

Approved:

L. Q. C. LAMAR,

Secretary.

MINING CLAIM—APPLICATION—SURVEY.

S. F. MACKIE.

An application for patent or the survey of a claim may embrace several contiguous locations.

In accordance with statutory requirement, the survey should exhibit the boundaries and conflicts of each location covered by the application.

Acting Secretary Muldrow to Commissioner Sparks, October 25, 1886.

I have before me a letter from S. F. Mackie, of Salt Lake City, Utah, stating that the surveyor-general has made certain rulings relative to an application for the survey of a mining claim, which he regards as erroneous, and requesting the opinion of this Department thereon. To render an opinion upon such a presentation of a question is neither customary nor proper, and I would therefore be compelled to dismiss the request were it not accompanied by a communication from yourself asking a ruling for the benefit of the Land Office.

The questions presented arise out of departmental decision in the case of the Good Return Mining Co. (4 L. D., 221), which was also promulgated through circular of December 14, 1885 (Id., 374). Therein it was ruled that, where there is an application for patent for a "mining

claim" consisting of several mining locations, the applicant may show for the consolidated claim the expenditure specified in section 2325, R. S., but that he must show upon each location the expenditure specified in section 2324, R. S.; and that "an adverse claimant may prove abandonment of any one of such locations by failure to make annual expenditures upon it or upon a common claim for its benefit." This decision manifestly recognized the legality of an application for patent for a mining claim consisting of several locations, and such an application was afterwards expressly ruled to be legal in the case of the Champion Mining Company (4 L. D., 362), upon appeal from a decision of your office made prior to the rendition of the Good Return decision. Since your communication above referred to suggests a doubt concerning the import of said Champion decision, I may add that it was intended to rule only that a single application, either for patent or for the survey of a mining claim, is required when the claim includes several contiguous locations. It was not intended to and does not rule in relation to the mode or the expense of surveying such claims. These questions arise upon the alleged decision of the surveyor-general of Utah to the following effect, to wit:

"*First.* That each location must be considered as a separate lot, be separately surveyed, its boundaries marked by posts set at each corner, and the conflicts with all other lots (howsoever owned) shown.

"*Second.* That the deposits properly required by him are \$27.00 for each location and \$5.00 for each conflict."

In respect to the first question, the statutes seem to be plain. Section 2325, R. S., provides that a person, who has complied with the terms of the mining laws, and who applies for patent on a lode claim, must file in the local office a plat and field notes of his claim, which are described as follows, to wit:

"A plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground.

Sec. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required."

The purpose of the requirement of plats in certain cases is manifestly twofold, namely, to inform the Land Department, as well as conflicting locators or protestants, of all the material facts concerning the claim which can be shown by plat and field notes. The Land Department must be advised that the claim, discovery, etc., are located on the public domain, and therefore the plat must show all conflicting locations or claims, patented or unpatented. The applicant must also show that he has complied with the law in respect of the annual expenditure on each location, and consequently the survey must identify each location. The applicant must give notice of his claim to the world, in order that conflicting locators may file adverse claims; by such claims the issue raised is priority or maintenance of possession, and, as possessory rights

respect individual locations under the statute, the plats must distinguish the locations. Or, again, each location must be distinguished, to the end that protestants may be able to identify the land in respect of which a non-compliance with local or general law is charged. And, finally, a survey of each location included in the application and patent is essential to the protection of the claimant; for, under the decision in *Mining Co. v. Mining Co.* (118 U. S., 196), the plat must show that the end lines of each location are parallel, in order that the patentee may have the right to follow a vein outside of the bounds of such location.

Apart from this general consideration of the purposes of a survey, the language of the statute would seem to be conclusive of the question. By Section 2325, the survey is required to be "of the claim or claims in common," and to show "the boundaries of the claim or claims." The word "claim" in the mining laws has different meanings, and may refer either to a single location or to consolidated locations, as the intention of Congress in using it requires. In this case, in my judgment, it refers to the separate locations, not only because the intention of Congress can be satisfied by this construction alone, but because the word is used in both the singular and plural, and in the latter case manifestly refers to the "claims held in common" mentioned in Section 2324, which mean the separate locations. The statute therefore expressly requires that the survey shall exhibit the boundaries of each location covered by the application. Such has heretofore been the ruling of the Land Department, and it is thus substantially expressed in paragraph 7 of circular of December 4, 1884 (3 L. D., 540), which was not modified by circular of December 14, 1885 (4 L. D., 374). Such, also, is the effect of the decision in *Smelting Co. v. Kemp* (104 U. S., 636, 653), where the supreme court ruled upon this point as follows, to wit:

"The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered."

Here the court decide that there may be one application for several contiguous locations, with one plat, and proof for the consolidated claim of the work required by section 2325; and this decision was followed by the Department in the case of the Good Return Mining Co. (*supra*). When, however, they refer (p. 654) to proof of the annual expenditure required by section 2324, they construe the words "claim or claims" in the former section as identical with those words in the latter in the following passage, to wit:

"There is no force in the suggestion that a separate patent for each location is necessary to insure the required expenditure of labor upon it. The statute of 1872 provides that on each claim subsequently located until a patent is issued for it, there shall be annually expended in labor

or improvements one hundred dollars; and on claims previously located an annual expenditure of ten dollars for each one hundred feet in length along the vein; but where such claims are held 'in common,' the expenditure may be upon any one claim. As these provisions relate to expenditures before a patent is issued, proof of them will be a matter for consideration when application for the patent is made. It is not perceived in what way this proof can be changed or the requirement affected, whether the application be for a patent for one claim or for several claims held in common."

The case of *Chambers v. Harrington* (111 U. S., 350) is to the same effect, and clearly implies that the claims in common which may be included in one patent under section 2325 are the separate locations on or for each of which the annual expenditure must be made.

I therefore approve the existing regulations of the Land Department, namely, that the plat of survey when required, must show the boundaries and conflicts of each location of the consolidated claim.

In respect to the second point raised by your letter of inquiry, to wit, the expenses of the survey, I do not deem it expedient now, if indeed it be possible, to formulate a fixed ruling. Such matters are remitted to the control of your office by section 2334, R. S., subject of course to the supervision of the Department. The existing tariff of charges, approved by the Land Department, being presumptively reasonable where application is made for the survey of a single location or claim, I can conceive of cases where perhaps it would properly apply to the survey of consolidated claims; and, again, I can conceive of cases where probably, if applied, the expenses would be unreasonable. But it would seem that the decision of the question in each case must depend on the particular facts, the form and relation of the several claims and conflicts, and therefore could not be intelligently reached without an inspection of the plat. I remit this question to your office for further consideration, and for the formulation and submission to the Department of a modified tariff of surveying charges, if a fixed ruling in the case of consolidated claims be deemed practicable.

RAILROAD GRANT—RESERVATION.

MCANDREW v. CHICAGO, M. & ST. P. RY. CO.

The inadvertent marking on the records of the local office of a warrant location constitutes no appropriation or reservation of the land covered thereby.

The case of *Cole v. Markley* cited and distinguished.

Acting Secretary Muldrow to Commissioner Sparks, October 28, 1886.

I have considered the appeal of James K. McAndrew from your office decision of January 19, 1885, adverse to him as pre-emption applicant for the SE. $\frac{1}{4}$ of Sec. 7, T. 96 N., R. 39 W., Des Moines, Iowa. The facts as disclosed by the record before me are as follows:

McAndrew presented his pre-emption declaratory statement at the local office December 2, 1884, for the tract above described, and his

application to file was on the same day refused, for the reason that said tract "appears to be covered by land warrant location Wt. No. 45, 167-160 a. —act 1855, and is moreover within railroad limits." From this action he appealed to your office, and claimed that the abstract of land warrant locations for May, 1857, shows that the warrant above mentioned was located on the corresponding tract in range "38" and not in "39," where this tract lies.

In examining the case on appeal your office found that its records "do not show any entry of the tract, but do show that said warrant was located on the corresponding tract in range 38, and that the location was patented December 1, 1859."

The decision, the appeal from which is now before me, therefore declared the objection, on account of the land warrant location, untenable, but found the tract in question to be within the ten miles, or granted, limits of the grant to the State of Iowa for the railroad now known as the Chicago, Milwaukee and St. Paul Railway, and within the twenty miles limits of the grant for the Sioux City and St. Paul Railroad, both of which grants were made by the act of May 12, 1864 (13 Stat., 72).

Said decision also recites that the line of road first named was definitely located opposite the tract in question September 2, 1869, and further that said tract fell within the limits of the withdrawal of September 12, 1864. It held that consequently the land is not subject to disposal under the laws of the United States, and for this reason affirmed the action of the local office rejecting appellant's application to make pre-emption filing for the tract.

An examination of the records of your office shows that the application to locate the land warrant herein mentioned described the tract which was subsequently patented under said location. It is therefore manifest that the marking of the location on the records of the local office as in range 39 was an inadvertence, or error, and that it in no sense constituted a disposal of the tract covered by such erroneous marking.

The grant for the benefit of the railroad companies, in section one thereof, granted—

"Every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes are definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid," etc.

The tract in question had not at the date of the definite location of the line of road been sold, nor had any right of pre-emption or homestead settlement attached to it; and, so far as the records show, it does not appear that application had ever been made for it by any settler or claimant whatsoever. Neither had it been reserved by the United States for any purpose whatever. The mere inadvertent marking on the books of the local office could in no sense be regarded as a disposal of the land. No one was seeking its ownership, consequently there was no one to whom disposal could be made. It could not be construed as a reservation within the meaning of the law (*Cole v. Markley*, 2 L. D., 847), for this would imply a purpose, while inadvertence denotes the absence of purpose, or that a thing is done contrary to purpose and intention.

This tract could have been claimed under the settlement laws by any one qualified at any time prior to said definite location, and had it been so claimed attention would have been called to the erroneous marking and the correction would have been made, as has now been done. This being true, the conclusion must be that the tract was public land, subject to disposal under the general laws, and therefore that it was subject to the railroad grant.

Your office decision denying McAndrew's pre-emption application is affirmed.

NOTICE OF HEARINGS AND DECISIONS.

CIRCULAR.

*Commissioner Sparks, to registers and receivers, and surveyors-general,
October 28, 1886.*

In addition to the registration of notices of hearings and decisions, as provided in circular of October 15, 1884 (3 L. D., 140) it is hereby directed that all notices required to be given by you of your decisions, or of decisions of this office, involving the right of appeal, or the exercise of other rights within a certain time or compliance with some official requirement, will hereafter be served by you personally or by registered letter.

When personal service is had you will transmit to this office the acknowledgment of such service or evidence thereof. When service is made by registered letter the return letter receipt, or returned letter as the case may be, must, in every instance, be sent up with the papers in the case.

The costs of registration will be paid out of the advances from the proper appropriations, and estimates therefor will be embraced in the usual requisitions.

Approved:

L. Q. C. LAMAR,

Secretary.

REVIEW DENIED.

EBBOTT v. SCHAEZEL ET AL.

Motion for review of decision herein (4 L. D., 587), denied by Secretary Lamar, October 30, 1886.

PRACTICE—APPEAL: ACT OF APRIL 21, 1876.

ST. PAUL M. & M. RY. CO., ET AL. v. VANNESST.

Though the General Land Office may refuse to receive an appeal from its decision not filed in time, it has no authority to dismiss such appeal if it is received without objection.

There is no authority under the first section of the act April 21, 1876, for the confirmation of an entry and issue of patent where title has already passed from the government.

Secretary Lamar to Commissioner Sparks, October 30, 1886.

On September 16, 1886, counsel for Orlando Vannest filed an application for an order directing you to certify to this Department the proceedings in the case of the Saint Paul, Minneapolis and Manitoba Railway Company and the Crookston Improvement Company v. said Vannest, involving lots 6 and 7 of Sec. 25, T. 150 N., R. 47 W., and lot 4 of Sec. 30, T. 150 N., R. 46 W., Crookston land district, Minnesota.

It is averred that your office on May 28, 1886, erroneously decided that the application of Vannest for the issuance of a patent for said lands under the act of April 21, 1876, (19 Stat., 35), must be denied, because patents for the same land had been issued by the Department on September 4, 1879, and February 19, 1881, which were still outstanding, and also that your office, on September 1, 1886, erroneously and unlawfully held and decided that an appeal from its decision, dated May 28, same year, filed by Vannest on July 29, 1886, was not filed within the time prescribed by the Rules of Practice (4 L. D., 35), and therefore could not be recognized or entertained.

It is insisted by the applicant that (1) the appeal was filed in time, and (2) that by said act of April 21, 1876, this Department is compelled to issue patents for lands when the entries fall within the class mentioned therein, notwithstanding the fact that patents have already issued, and are outstanding for the same land.

It appears that the appeal was filed on the 29th day of July, 1886, and the decision states that "notice was mailed to Messrs. Drummond and Bradford, of this city, the recognized attorneys for said Vannest, on May 28." If that statement is correct, then it is clear that the appeal was not filed within the prescribed time, and could be dismissed by the proper tribunal. It is strenuously urged that the finding in said decision that the notice was mailed on May 28th is not warranted by

the practice of your office. No evidence is offered that said letter was not mailed as alleged, and hence there is no reason for disturbing said decision upon a question of fact.

The appeal was filed in your office on July 29, 1886, and was not rejected until September 17 ensuing, as appears from the record. After the appeal had been received without objection, the only jurisdiction that could be exercised by your office was to transmit the case to this Department for final action. *King v. Lietensdorfer* (3 L. D., 110).

Rule of Practice No. 82 provides that "When the Commissioner considers an appeal defective he may notify the party of the defect and if not amended within fifteen days from the date of service of such notice, the appeal may be dismissed by the Secretary of the Interior, and the case closed."

Unquestionably your office may refuse to receive and file an appeal when the same is not presented within the time prescribed by the Rules of Practice, but after the appeal has been filed and no objection made thereto, then the appeal can only be dismissed by this Department.

But independently of the foregoing it does not appear that there was any error in said decision refusing to issue patent for said lands, or that Vannest has suffered material injury from the rulings of your office.

It is well settled that a writ of certiorari can not be demanded as a matter of right, but will issue in the discretion of the tribunal on a *prima facie* showing of substantial injustice to the applicant. *F. P. Harrison* (2 L. D., 767); *N. P. R. R. Co. v. Schoebe* (3 L. D., 183); *Jacob Schaetzel* (4 L. D., 28).

Said decision refusing to issue patent for the land claimed by Vannest was based upon the authority of the decision of this Department in the case of the Wisconsin Railroad Company *v. Stinka* (4 L. D., 344), decided on January 25th last, wherein said act was fully considered, and upon authority of numerous decisions of the United States supreme court, therein cited, it was held that "application for the confirmation of an entry and the issuance of patent thereon under the first section of the act of April 21, 1876, must be denied, where it appears that title has already passed from the government."

Counsel for the applicant have cited several departmental decisions announcing a contrary doctrine. But said decisions though not expressly named, yet in effect were overruled by the case of the Wisconsin R. R. Co. *v. Stinka* (supra).

There is nothing in said act to indicate that Congress intended that this Department should issue a patent for lands to which the United States have no title. If the applicant has complied with the terms of said act, his rights must be asserted or defended in the courts of the country, for this Department has no further jurisdiction over the land in controversy.

It is therefore considered that said application be, and it is hereby, denied.

HOMESTEAD ENTRY—ACT OF JUNE 8, 1872.

ELISHA B. GATES.

Under section 2305 of the Revised Statutes the time allowed for military service is deducted from the five years residence required before final proof, but the quality of residence and cultivation provided for in said section is the same as under the general homestead law.

As in every case the entryman must show good faith, it is not of itself a suspicious circumstance that he offers final proof at the earliest period permissible under the law.

Secretary Lamar to Commissioner Sparks, October 30, 1886.

This case presents the appeal of Elisha B. Gates from the decision of your office, dated August 28, 1885, refusing to revoke and modify the decision of your office dated June 17, 1885, holding for cancellation his homestead entry of the SE. $\frac{1}{4}$ of Sec. 23, T. 114 N., R. 60 W., Huron land district, Dakota Territory.

It appears that on April 16, 1883, (not April 6th, as stated in decision dated June 17, 1885,) Gates made homestead entry No. 3331 of said tract under the act of Congress approved June 8, 1872 (Section 2304, R. S.), giving homesteads to honorably discharged soldiers and sailors, their widows and orphan children.

On April 21, 1884, after due notice, Gates made his final proof before the receiver of the local land office, which was accepted, and final certificate No. 139 was issued for said land on the same day. The final proof showed that the entryman was a native born citizen of the United States, and the head of a family; that he settled upon said land on April 17, 1883, and built a house thereon, ten by twelve feet, one story with board roof; that he has broken and back-set twenty-eight acres of said tract; that his improvements were worth \$300.00, and that he has resided continuously upon said tract since making his said entry, with the exception of three months of temporary absence. With said proof is filed a special affidavit, corroborated by two witnesses, alleging that said Gates slipped and fell on the ice on the 8th day of February, 1884; that in consequence of the injury thus received, he was disabled for six weeks, and unable to return to his home on said land; that said Gates was in the military service of the United States and lost a foot and part of his leg above the ankle joint in said service.

On June 17, 1885, your office, having verified the allegation of military service from the records of the War Department, examined said entry papers and held the entry for cancellation, "because the evidence submitted fails to show good faith in the premises." On January 7, 1885, counsel for Gates made a motion for a review of said decision, and submitted additional affidavits tending to show compliance with the homestead law.

In such affidavits Gates and his three witnesses swear, that he commenced an actual *bona fide* residence on said tract on April 17, 1883, in a good house, ten by twelve feet, having a double board roof and tarred paper between the boards; that during the months of May and June of said year he had twenty-eight acres of the land broken, the stones dug out and drawn off; that during the fall of 1883 he had the same breaking back-set, pulverized and cultivated, ready for crop, during the season of 1884; that in addition to this twenty-eight acres he contracted to have about one hundred additional acres broken on the tract; that he raised no crop during the year 1883, for the reason that it was necessary to put the ground in proper condition; that he did not sow the twenty-eight acres until the first of May, 1884; that he had purchased the seed-wheat with which to sow the land, and had the same on hand at the time of making his final proof; that it was impossible to prepare the bald prairie for a crop during 1883; that in May, 1884, he sowed the twenty-eight acres in wheat and harvested therefrom five hundred bushels; that during the month of June, 1884, he had twenty-three acres additional of said land broken and ready for crop in 1885; that in the spring of 1885 said Gates had twenty acres additional broken, twelve of which were planted in corn on the sod; that at the time of making said affidavit he had fifty-one acres of wheat and twelve acres of corn growing in good condition upon said land; that since he established his residence upon said tract on April 17, 1883, up to the time of making said affidavit, he has resided on said tract, and has only been absent about three months during the fall of 1883; that when he went away he intended to be absent only one month to attend an important law suit in Pennsylvania, his former home; that while so absent he slipped and fell on the ice and injured his hip, upon the same side on which he has a wooden leg in place of one lost by amputation on account of a wound received while in the army of the United States; that said injury laid him up for six weeks, so that in consequence thereof he failed to return to his home in Dakota for three months; that he has a wife, but no children, and that his wife refused to come to Dakota to live under any circumstances, on account of her fear of storms and cyclones.

It is further alleged in said affidavit that Gates is fifty-nine years old; that while serving in the army he lost his left leg below the knee, and uses an artificial limb; that he is the present owner of said land and has never transferred or mortgaged the same; that said tract is the only land he owns and that he has all of his money invested thereon; that he has no intention of abandoning the land, but that it is now, and he intends to keep it, his home and further improve it as he becomes able to do so; that since establishing his residence upon said tract he has had no other home or claimed any other; that this is the only claim he has, and that he has not dug a well on the premises, because he gets his water from a well across the road, on the land of a neighbor; that

he has no barn on the land for the reason that he has heretofore hired all of the breaking and cultivating done, and will not have any use for one until he takes off the crop for the present season; and that while he has been unable to build a better house up to this time—much to his regret—yet he will, if no accident occurs, build a better house in the fall ensuing.

On August 28, 1885, your office refused said motion, and the decision states that "Claimant served in the army and lost a leg in said service. He made final proof within the shortest period allowed by the statute, viz: one year—claiming a credit of four years for army service. . . . This office views with suspicion cases where the entryman makes final proof within the shortest period allowed by legal requirements, when *good faith is not clearly and conclusively* shown, by the character of the improvements, residence and cultivation. If Gates is sincere in desiring to obtain title to the land for a permanent actual home, to the exclusion of all other homes, as contemplated by law, he may submit final proof anew, when he can establish these facts to the satisfaction of this office. I see nothing in the evidence now submitted which entitles the claimant to a reversal or even modification of my former decision in the case."

It will be observed that the former decision of your office held Gates's entry for cancellation and the subsequent decision seems to so modify the former, as to allow Gates to submit new final proof.

Section 2305 of the Revised Statutes provides that, "the time which the homestead settler has served in the Army, Navy, or Marine Corps, shall be deducted from the time heretofore required to perfect title but no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements."

It is evident that Congress intended that the time allowed for military service should be deducted from the five years' residence required of the entryman before the issuance of final certificate, and that the residence and cultivation required of the discharged soldier or sailor are of the same character as those required of other homestead entrymen. In the present case the entryman made the preliminary affidavit required, and after due notice made his final proof four days after the expiration of the year from the date of settlement and residence on said tract. His final proof was made before the local land officers and to their satisfaction. It does not appear that said proof was in any respect false or fraudulent. The supplemental affidavits set forth in detail the cause of Gates' temporary absence from the land, the amount of cultivation done upon the land and the further fact that since making said entry Gates has continued to live upon the land, making it his home to the exclusion of any other.

The mere fact that the homestead entryman offers his final proof at the expiration of the time prescribed by law is not of itself a suspicious circumstance. In every case the entryman should show good faith, whether the proof is offered at the expiration of the five years, or within two years thereafter.

The local land officers before whom the final proof was made accepted the same and issued the final certificate. The supplemental proof sustains the final proof, gives a reasonable explanation of the temporary absence of the entryman, and the failure of his wife to live on the land. There is no adverse claimant, and there is not sufficient evidence to warrant the finding that the entryman has acted in bad faith. It is therefore considered that said decision canceling said entry be and the same is hereby reversed.

FINAL PROOF—ADVERSE CLAIMANTS.

QUIRK v. STRATTON.

On the day fixed for submission of final proof, adverse claimants who have received due notice thereof, must appear and show cause why such proof should not be accepted, or lose the right to be subsequently heard therein.

Secretary Lamar to Commissioner Sparks, October 30, 1886.

On April 21, 1884, Francis I. Quirk made homestead entry for Lots 2, 3 and 4, Sec. 6, T. 108 N., R. 63 W., Mitchell, Dakota. On April 24, 1884, Bowman L. Stratton filed declaratory statement for these tracts, alleging settlement April 21st preceding.

Stratton gave the usual notice of intention to make proof, specially citing Quirk. In accordance with said notice Stratton submitted proof on December 20, 1884. On that day one Edward Devy appeared as attorney for Quirk, and filed the following request: "I hereby specially appear for said Francis I. Quirk, and ask that a hearing be ordered in the above entitled case to determine the rights of both parties thereto." Said request is indorsed: "Filed Dec. 20, 1884, 10:30 A. M."

Upon the question of ordering a hearing the register and receiver were divided in opinion. The former held: "An order for a hearing is disallowed for the reasons that it appears that Quirk was specially notified to appear at this office on December 20, and show cause why the proof should not be allowed and made of record. He gives no reasons for his failure to put in testimony on that day. And this proof is allowed and transmitted under the instructions contained in Marquardt v. Olson."* The receiver held: "I do not concur in the opinion of the register. I think a hearing should be ordered." Your office, by letter of May 4, 1885, affirmed the opinion of the register rejecting the request for a hearing. Quirk's attorney filed appeal.

* 11 C. L. O., 213.

Quirk was specially cited in order that he might present objections to the final proof. Good practice and despatch of business require that he should appear on the day named in the notice and submit his objections. If, however, more time be necessary to obtain evidence, or to secure a full presentation of his case, upon proper showing, he is entitled to a continuance. In the present case Quirk's attorney did not offer to cross-examine the witnesses, nor did he allege any reason for the postponement of the case. Had he shown that he was not prepared for trial, or that a continuance of the case would in any manner benefit him, a different question would be presented. On the showing made by the record, the request for a hearing was properly denied, and said decision is accordingly affirmed.

PRACTICE—TIMBER CULTURE CONTEST.

DAVIS v. BOTT.

The contestant having offered, on the day of hearing, to cure certain defects in his application to enter was thereafter entitled to proceed with the contest.

Secretary Lamar to Commissioner Sparks, October 30, 1886.

In the case of Clarence H. Davis *v.* Vallentin Bott, involving the NE. $\frac{1}{4}$ of Sec. 10, T. 108 N., R. 36 W., 5th P. M., Tracy, Minnesota, an appeal has been filed in behalf of Bott from the decision of your office, rendered January 21, 1885. The material facts to be considered herein are as follows :

On the 13th of February, 1880, Bott made timber-culture entry No. 1269 of the tract specified; and on the 13th of March, 1884, Davis filed affidavit of contest against said entry, the charge being a failure to comply with the law in the matter of planting and cultivating. Hearing was set for May 30, 1884, at which date the defendant appeared specially and moved to dismiss the case on the following grounds:

First, Because the affidavit accompanying the application to enter under the homestead law was sworn to before a notary public, who is not an officer authorized to administer oaths in homestead cases; and

Second, Because said homestead application was unsigned.

At the same time the contestant offered to sign his said application, and have it filed *nunc pro tunc*, and also offered to file a new affidavit sworn to before the proper officer.

The local officer sustained the motion of defendant to dismiss, basing their ruling on the Bundy-Livingston case (1 L. D., 179); but, on appeal, their decision was reversed by your office in the decision before mentioned, and the contestant was allowed the right to proceed with his contest, under the ruling in Bennett *v.* Taylor (2 L. D., 48).

I am of opinion the judgment of your office was correct. The offer of Davis, made on the day set for hearing, to cure whatever defects there

were in his contest was good, under the rule in *Ferrier v. Wilcox* (4 L. D., 470), and cited cases.

The decision appealed from is therefore affirmed, and the contest of Davis will proceed in regular order.

PRACTICE—APPEAL—EVIDENCE.

BUSHNELL v. BURTT.

Rules 48 and 49 of Practice contemplate the reversal or modification of a decision of the local office, if it is contrary to existing laws or regulations, though the appeal therefrom is not filed in time.

When testimony in a contest is taken before an officer, other than the register or receiver, the order therefor should be made of record in the local office.

After the dismissal of contest it should not be re-opened, and proceedings had thereunder, without due notice to the defendant.

Secretary Lamar to Commissioner Sparks, October 30, 1886.

I have considered the case of *D. W. Bushnell v. Harry D. Burtt*, involving the latter's timber-culture entry No. 1404 on the SW. $\frac{1}{4}$ of Sec. 4, T. 114, R. 75, Huron, Dakota, on appeal by Bushnell from your decision of May 8, 1885, holding his entry for cancellation.

Your said decision was made upon the appeal of Bushnell from the action of the local officers, urging that said action was irregular and contrary to existing regulations, and it dismissed the appeal because it held said action to be regular and proper and because said appeal was not filed within the prescribed time. The record shows that said appeal was not filed within the thirty days prescribed in Rule 44. Rules 48 and 49 contemplate, however, that a decision of the local officers shall be modified or reversed, as the case requires, notwithstanding a failure to file the appeal in time, "where the decision is contrary to existing laws or regulations." As irregularity and illegality in the decision of the local officers is charged in Bushnell's appeal to your office, I will consider his appeal from your decision refusing to find such irregularity and illegality.

The papers before me show that Burtt's timber-culture entry was made March 5, 1883, and that on March 6, 1884, Bushnell filed affidavit of contest against it, alleging failure to break during the first year. The testimony, it appears, was taken before one I. E. Youngblood, a notary public, on May 22, 1884; but there is no record of the order of the local officers on which it was taken. This is certainly an irregularity on the face of the record. It was perhaps the want of such order that caused the mistake under which the local officers afterwards dismissed the contest, as hereinafter referred to.

It also appears that service of notice of the hearing was made by publication, upon Bushnell's affidavit, stating that Burtt's residence was unknown to him. Under settled rulings, such an affidavit is insuf-

ficient, and the notice under it invalid. *Ryan v. Stadler* (2 L. D., 50); *Parker v. Castle* (4 L. D., 84).

Again, it appears that on the day set for final hearing at the local office, to wit, June 2, 1884, Burt's attorneys appeared for the purpose of protecting his interests, but Bushnell did not appear in person or by attorney; and thereupon the local officers dismissed the contest for default. Afterwards, and on the same day, the testimony taken before Youngblood was rejected by the local officers, for what reason does not appear. And still later, to wit, on June 24, 1884, Bushnell's attorney filed an affidavit admitting that he had neglected to appear on the day set for hearing, but alleging that said neglect was not Bushnell's fault, and at the same time and for said cause he moved the re-opening of the case; and thereupon the case was re-opened, without notice to Burt's attorney, the said evidence was accepted, and upon it the entry was held for cancellation. This was manifestly and flagrantly wrong, for it deprived the contestee of the defence which he had offered to make.

By reason of the aforesaid irregularities and errors the said decision is reversed, and all the proceedings subsequent to the filing of the affidavit of contest are hereby set aside, with leave to the contestant to proceed anew after proper notice.

PRACTICE—SERVICE OF NOTICE.

CROWSTON v. SEAL.

Service of notice upon a non-resident made by registered letter held good, it appearing that the defendant received such notice more than thirty days before the day set for hearing.

Secretary Lamar to Commissioner Sparks, October 30, 1886.

I have considered the case of *Joseph Crowston v. William Seal*, as presented by the appeal of the latter from the decision of your office, dated May 3, 1885, dismissing his appeal from the decision of the local land officers denying his motion to dismiss Crowston's contest against Seal's timber culture entry No. 1256 of the NW. $\frac{1}{4}$ of Sec. 9, T. 161 N., R. 53 W., made November 17, 1881, at the Grand Forks land office, Dakota Territory.

The record shows that Crowston initiated a contest against said entry on January 15, 1884. On March 10th both parties appeared in person and by counsel, and upon objection made by counsel for contestee to the sufficiency of the affidavit the local land officers report that "the contestant let the contest drop and a new affidavit was filed March 18, 1884, and summons issued March 27, 1884, fixing the hearing for June 4, 1884, and on March 31st Cox and Merriman admitted service of notice, and on April 19th the attorneys for contestant mailed a copy of the notice in a registered letter to Seal, which he received May 2d, more than thirty days prior to the day of hearing."

There appears in the record what purports to be a receipt of William Seal of "Reg. No. 148, addressed to William Seal, Kennedy, Minn.," with directions to "return to Bennett and O. Keefe, Grand Forks, Dakota;" also a receipt of R. McDonald, postmaster of Grand Forks, Dakota Territory, of registered letter, parcel No. 148 from Bennett and O. Keefe, addressed to William Seal, Kennedy, Minnesota.

At said hearing Seal appeared specially and moved to dismiss said contest, on the ground that "no notice of the hearing in said action has been served upon the said claimant." The only error insisted on by the appellant is that no service was perfected upon him as required by the rules of practice.

Rule of Practice No. 10, under which said contest was initiated, provides that "Personal service shall be made in all cases, when possible, if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served."

Rule 11 provides that "personal service may be executed by any officer or person."

Rule 12 provides that "Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that personal service can not be made."

Rules 13 and 14 provide how publication shall be made.

Rule 15 provides that "Proof of personal service shall be the written acknowledgment of the person served, or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service."

In the case of *Parker v. Castle* (4 L. D., 84), this Department held "that these rules have in effect the force of a statute The proper basis for an order of publication, the publication by advertisement, the sending of a copy by registered letter, and the posting of copy on the land, are all constituent and essential parts of 'notice by publication,' and the absence of any one of these essentials makes inoperative the efficacy of the others, if the defect be not waived. See *Wallace v. Schooley* (3 L. D., 326)."

In the departmental decision of *Milne v. Dowling* it was held that "the mere fact that a claimant has knowledge of a pending contest against him does not bring him into court, and does not render it incumbent on him to defend his claim." See also *United States v. Raymond* (4 L. D., 439); *Miller v. Knutsen* (*ibid.*, 536).

In the case at bar, counsel for Seal appeared specially, and moved to dismiss for want of proper notice. There was no denial that Seal received said registered letter, sent by the attorneys of the contestant, and while it is not enough that "the notice was sufficient to put the claimant on inquiry," unless due service has been made in accordance with Rule of Practice No. 15, yet in the case at bar it would seem that

the service was sufficient, and the motion to dismiss was properly overruled.

An examination of the whole record shows no good reason for disturbing said decision, and it is accordingly affirmed.

HOMESTEAD ENTRY—COMMUTATION PROOF.

EVAN L. MORGAN.

Commutation proof approved for patent where the entryman died after the submission of final proof, which if not altogether satisfactory with respect to residence, failed to show any want of good faith.

Secretary Lamar to Commissioner Sparks, October 30, 1886.

This is an appeal by the attorney for Evan L. Morgan, deceased, from the decision of your office, dated July 13, 1885, rejecting his commutation proof and holding for cancellation his cash entry No. 10023 of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 113 N., R. 65 W., 5th P. M., Huron land district, Dakota Territory.

It is shown by the record that said Morgan made homestead entry No. 2825 of the NW. $\frac{1}{4}$ of said section on April 2, 1883. On June 25, 1884, Evan L. Morgan gave due notice of his intention to make final proof before the local land officers on August 15th, same year. The register and receiver were satisfied with the proof and allowed said Morgan to make proof and payment for said land under section 2301 of the Revised Statutes. The final proof shows that said Morgan was a single man, duly qualified to make said entry; that he settled and built a house on said land in September, 1883, and has lived thereon continuously, with the exception of temporary absences of two or three weeks at a time; that his improvements consist of a house eight by ten feet, forty acres of breaking, a well—all valued at \$200.

On April 9, 1885, said entry was suspended and a special affidavit was called for to "show the number, duration and causes of all absences."

On April 27, 1885, Edward D. Morgan filed an affidavit, corroborated by two witnesses, in which it is averred that said Edward D. Morgan is the brother of said Evan L. Morgan; that Evan L. Morgan died on or about the 12th day of February, A. D. 1885; that he commenced residing on said land on or about the 20th day of October, 1883; that during the month of November, same year, he left said land and went to Wisconsin, on account of his ill health, where he remained until March, 1884, when he returned to Dakota and again resumed his residence; that during the spring and summer of 1884, until he made his final proof, he was compelled to work at his trade, as a printer, in Huron, to support himself, being unable to do manual labor on a farm, on account of ill health. That during this time he was never absent

from the land for a longer period than two weeks at any one time; that he returned to the land as often as his health and means would permit; that said entryman had been an invalid from his childhood; that his death was caused by inflammatory rheumatism, which had made him a confirmed invalid for a long time; that owing to the ill health of said Evan L. Morgan it would have been unsafe for him to have lived on said land during the winter of 1883, and that it was absolutely necessary for him to earn his support at his trade. Your office, on July 13, 1885, considered said affidavit, and held that it was "entirely insufficient as showing the actual continuous residence required by law. The proof is therefore rejected and the original entry and the certificates are held for cancellation."

Said decision found that Morgan established his residence in September, 1883, and there is no sufficient evidence that he ever intended to or did abandon the land or change his residence thereon. Sickness and poverty have always been held, when clearly shown, to be a sufficient excuse for temporary absences of the entryman. If Morgan were alive, in the absence of any evidence showing bad faith, he would be permitted to make new proof showing the required residence, in case the proof already furnished was held insufficient. His death prevents any further compliance on his part. He made cash entry of only one half of his original entry, and in view of the improvements made upon said land, as above set forth, the ill health and poverty of Morgan, and the absence of any adverse claim, it would seem that said cash entry should be allowed to remain intact and that patent should duly issue thereon.

It is considered, therefore, that said decision of your office holding said entries for cancellation be and it is hereby reversed, and the case remanded.

SCHOOL LANDS IN WASHINGTON TERRITORY.

JOHN W. BAILEY ET AL.

The act reserving lands to the Territory for school purposes, so far as it affects the reservation of such lands, is the same in effect as an absolute grant.

By the act of February 26, 1859, authority is conferred for the selection and approval of indemnity lands to cover deficiencies caused by fractional school sections.

Secretary Lamar to Commissioner Sparks, November 3, 1886.

The matter now under consideration involves the right to enter under the homestead, pre-emption and timber-culture laws certain described lands in the Walla Walla land district, Washington Territory, selected by the Commissioners of Walla Walla county, under the act of February 26, 1859, as indemnity for school lands to compensate for deficiencies by reason of section sixteen being fractional in quantity. It

embraces thirteen cases, which were transmitted to the Department on separate appeals, but as they all involve the same question they will be considered together. They are as follows:

John W. Bailey for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 8, T. 7 N., R. 36 E.:

* * * * *

The application to enter was in each case rejected by the local officers, whose action was approved by the Commissioner by letter of June 26, 1884, "for the reason that the Secretary, in his decision of December 7, 1883, held that the said tracts having been selected as indemnity under the grant for schools and approved by the Secretary are in a state of reservation, whether rightly so or not, and are not subject to sale or disposal during its continuance."

In the decision above referred to the Secretary refused to consider the question whether the Commissioners of Walla Walla county were authorized under the act of March 2, 1853, to make said selections, "because the lands applied for, being in a state of reservation, whether rightly or not, are not subject to sale or other disposition during its continuance."

Counsel now insist that the act of March 2, 1853, gave authority to the County Commissioners to make selections only in case the deficiency arose from school sections being taken by settlers before survey, and that as they derived no authority under the act of February 26, 1859, to make selections to compensate for deficiencies where sections sixteen and thirty-six are fractional, or wanting in quantity, that the act of said Commissioners making said selections and the approval by the Secretary of the same was without authority of law and was therefore void.

Hence the controlling question in this case is, whether under the act of February 26, 1859, the Secretary of the Interior had authority to approve such selections and by such approval to reserve said lands for the purposes indicated by that act.

I do not consider it necessary to pass upon the question so elaborately argued by counsel, to wit, that, if there was an absolute want of authority under the acts cited for the action of the County Commissioners or the approval of the Secretary, that their action being without legal sanction was an absolute nullity, and did not render such selections operative and valid so as to reserve them from entry, because after a careful consideration of the question I am satisfied that such selections were authorized under the act of February 26, 1859, and the approval of the Secretary thereof was a legal reservation of the land for the purposes indicated by the act, and hence were not subject to entry during the continuance of said reservation.

The act of March 2, 1853, providing for the territorial government of Washington Territory, by section 20, enacts:

"That when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bring-

ing the same into market, or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be and the same are hereby reserved for the purpose of being applied to common schools in said Territory, and in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the County Commissioners of the county in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to an equal amount in sections or fractional sections as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid."

It is very evident that under this act there is no authority to locate or select other lands in lieu of sections sixteen and thirty-six, except where said sections were occupied by actual settlers prior to survey thereof; but in such cases the right of the territorial authorities to select is unquestioned, and as fully authorized as in the case of a grant to a state. So far as it affects the reservation of the land, the terms of the act reserving such lands to the territory for school purposes have the same force and effect as of a grant to a state. In the one case the lands are granted, but such lands are not granted to the territories, but simply reserved for the purposes of common schools, and while such reservation does not amount to a grant, or so completely to a dedication in the stricter legal sense, as to withdraw from Congress the power of disposition over them, so long as it continues, it has for that purpose the same force and effect as a grant.

I can see no force in the position of counsel that as no grant whatever is made to a territory, but simply a certain reservation in contemplation of a future grant, there is no means for fully indemnifying the people of a territory for losses in the contemplated grant until it shall become a state, because the act establishing the territorial government provides that sections sixteen and thirty-six "are hereby reserved," and when said sections or either of them shall be occupied by actual settlers prior to survey thereof, the county commissioners are authorized to locate other lands to an equal amount in lieu of said sections so lost or occupied. Hence, if sections sixteen and thirty-six are reserved for the purposes of common schools and the commissioners have authority to select lands in lieu of lands lost by settlement prior to survey—the lands so selected and approved by the Secretary are in like manner reserved for such purposes.

But if there is any doubt as to the power of the Secretary to reserve lands so selected under the act of 1853, the act of February 26, 1859, not only solves the doubt as to such selections, but also authorized the selection of lands to compensate for deficiencies where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. It is under this clause of the act that the selections now under consideration were made.

The act of February 26, 1859, is entitled "An act to authorize settlers upon sections sixteen and thirty-six, who settled before the survey of the public lands to pre-empt their settlements"—which after providing that said sections shall be subject to the pre-emption claim of such settler, further provides—

"And if they or either of them shall have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors, and other lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional or from any natural cause whatever; *Provided*, that the lands by this section appropriated shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May 20, 1826."

By the terms of this act, where sections sixteen and thirty-six have been reserved or pledged for school purposes in any State or Territory, and settlement has been made on said sections prior to survey, other lands in lieu thereof are appropriated; and the words of the act, "other lands are *also* hereby appropriated to compensate deficiencies for quantity," etc., clearly indicates that it was the intention of Congress to enlarge the reservation provided for by former acts, so as to reserve for school purposes the usual quantity of lands contained in full legal sections, where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

Now, it is very clear that if such lands are appropriated in lieu of sections reserved that the lands so appropriated are in like manner reserved, depending only upon the subsequent action of the county commissioners, the certification of the Commissioner of the General Land Office, and the approval of the Secretary.

It is true that this selection and approval only amounts to a reservation, and—unlike a selection made under a grant to a State—is a matter over which the Department retains full jurisdiction and control; but such reservations should not be revoked or disturbed if they have been made in accordance with the principles of adjustment provided by the act of May 20, 1826. It not being denied that these selections were made according to the principles of adjustment provided by said act, I have not considered that question.

For the reasons above stated, I affirm the decision of your office in refusing to allow the aforesaid entries.

BLANK FORMS FOR FINAL PROOF.

CIRCULAR.

Commissioner Sparks to registers and receivers, November 2, 1886.

A supply of blank forms for use in pre-emption, homestead and commuted homestead final proofs has this day been transmitted to you. From the date of the receipt of these forms the same will be exclusively used by you and no proofs will be taken on the old forms thereafter.

You will at once forward by registered mail or prompt conveyance to each clerk of a court of record and to each judge of probate in your district, a sufficient number of the new forms for their immediate use, and will instruct them that these forms only are to be used by them, and that in no case will they be permitted to further use the old forms.

You will promptly reject all proofs transmitted by such officers that are not made on the new forms after the same shall have been distributed.

Registers and receivers, and officers taking proofs, are enjoined to use the utmost strictness in the examination of parties and witnesses, and to obtain full, specific, and unevasive answers to all the questions propounded in the new forms. This course will obviate the necessity for the cross-examination heretofore prescribed to remedy defects in the old forms, but all necessary oral cross-examinations will be made by attesting officers to further test the good faith of claimants and the reliability of the testimony of claimants and witnesses. Officers will certify to their oral cross-examinations.

Registers and receivers will carefully examine all proofs now in their respective offices upon which certificates have not been issued, and all that may be transmitted to them on old forms before the distribution of the new forms, and when such proofs are in any respect unsatisfactory, they will return the same and require new proofs to be made on the new forms, without, however, requiring new advertisements unless the original advertisement was defective or proof was not made as advertised.

They will in like manner examine all proofs transmitted on the new forms and will not issue certificates, nor place entries on record, nor transmit the proofs to this office until the same have been thus examined. Defective, insufficient, or unsatisfactory proofs will be rejected and new proof required.

Proofs taken by other officers than registers and receivers must be immediately transmitted, with the money, to the register and receiver. When any interval of time, other than that required for immediate and expeditious transmittal, elapses between date of proof and date of its receipt, with the money, at the district land office, a new final affidavit covering date of receipt of proof and payment by the register and receiver will be required before certificate is issued or the entry placed of record. Proof without payment must in no case be accepted or received by registers and receivers. All discrepancies between date of

proof and date of register's certificate and receiver's receipt must be accounted for by certificate from the register and receiver attached to each case.

You will furnish all clerks of courts and judges of probate in your district with copies of these instructions for their information and guidance.

Approved:

L. Q. C. LAMAR,
Secretary.

PRE-EMPTION—FINAL PROOF AND PAYMENT.

LOTTIE MERWIN.

Payment must be made at the time final proof is submitted.

Acting Secretary Muldrow to Commissioner Sparks, November 8, 1886.

I am in receipt of your letter of October 27, 1885, transmitting appeal of Lottie Merwin from your office decision of June 4, 1885, rejecting her pre-emption proof for the SE. $\frac{1}{4}$ of Sec. 4, T. 129 N., R. 56 W., Watertown district, Dakota. Her declaratory statement was filed October 15, alleging settlement October 5, 1883; proof was made July 1, 1884; payment was tendered February 23, 1885, after a lapse of nearly eight months from the time of making final proof. This delay in tendering payment is your reason for rejecting said proof, in accordance with your office instructions of November 18, 1884, holding that "proof and payment must be made at the same time," and that "proofs made without tender of payment must be rejected" (3 L. D., 188).

Claimant, in her appeal, alleges that she had expended all her earnings in the improvement of the land; that she made every effort to obtain the money with which to pay for the land, but was disappointed, and "was compelled to send her proof to the land office without the money."

But claimant was not compelled to make proof within nine months after settlement; she had thirty-three months in which to do so. If she made her pre-emption claim in good faith, intending the land for her home, no reason appears why she should not have waited until such time as she did obtain the money before making proof. To allow parties to postpone payment for months or years after making proof would involve additional and needless labor to the officers of the government, and cause inextricable confusion and complication of the office records. If Miss Merwin desires she will be permitted to make new proof, by showing six months actual residence on the land immediately preceding final entry. This will of course, as claimant suggests, involve additional expense to her; but this will be the result of her own haste in making her former proof when she had not the money to make payment for the land, and when it was unnecessary to do so.

SOLDIERS' ADDITIONAL HOMESTEAD.

MARY J. WOOLLEY ET AL.

An applicant for public land has the right at any time to withdraw his pending application and thus abate his claim.

On such withdrawal the applicant may properly revoke a power of attorney given for the prosecution of his claim.

Where through misapprehension as to the rights of the minor heirs the original application for the right of additional homestead did not contain the names of all the minors, the entry is allowed to stand, patent to issue in the name of the minor orphan children of the deceased soldier.

Acting Secretary Muldrow to Commissioner Sparks, November 9, 1886.

In April, 1878, Mary J. Woolley filed by guardian her application for the right of additional homestead entry, and on the 13th of December, 1878, your office certified that she as the minor orphan child of Andrew C. Woolley was entitled to an additional homestead entry of not exceeding one hundred and twenty acres, as provided in section 2306 of the Revised Statutes. July 18, 1882, said certificate was located, and entry No. 2532 allowed at the Walla Walla land office, Washington Territory, upon which entry final certificate No. 719 issued. In May, 1882, William L. Woolley, Roan M. Woolley, and Hattie C. Woolley filed, by their mother, Emeline M. Summers, guardian, their claim, as minor orphan children of Andrew C. Woolley, of right to make additional entry.

Accompanying the proof filed with said claim is the affidavit of Felix Woolley, who was the guardian of Mary J. Woolley, to the fact that the minor heirs of A. C. Woolley at the date (March 26, 1878) of his appointment as guardian were Mary J. Woolley, William L. Woolley, Roan M. Woolley, and Hattie C. Woolley, aged respectively sixteen, eleven, eight, and six years. On this showing your office, by its decision of February 7, 1885, declared the entry (final certificate 719), made in the name of Mary J. Woolley, illegal and held the same for cancellation.

April 20, 1885, Messrs. Drummond and Bradford, attorneys, were given by your office sixty days within which to show cause why said final entry should not be canceled. On June 10, 1885, they filed the affidavit of Emeline M. Summers to the effect that her application as guardian of William L., Roan M., and Hattie C. Woolley was made through a misapprehension of the facts in the case; that she did not know that a certificate had been issued and an additional homestead entry made in the name of Mary J. Woolley, one of the minor heirs of Andrew C. Woolley, deceased; that she knew an application had been filed by Felix Woolley, guardian of said Mary J. Woolley, but had been informed that said claim had never been certified; that she and said Felix Woolley were informed by the county clerk, and so believed, that her wards, William L., Roan M., and Hattie C. Woolley were not entitled to any portion of the additional entry, because they were the children of a wife of the soldier married after the war, and that Mary J. being the child of a former wife was alone entitled to make the ad-

ditional homestead entry; that for this reason the names of her said wards were not included in the first application; that she is now informed that an entry, final certificate No. 719, has been made in the name of Mary J. Woolley; that she believes said entry was made in good faith and that its cancellation would cause innocent purchasers to suffer; that in view of these facts, and of the further fact that the purchase price originally agreed upon has been secured by said innocent purchaser and will be equally divided among all of the heirs, including her wards, she now asks that she be allowed to withdraw the application made by her as guardian, and that the entry of Mary J. Woolley be allowed to pass to patent.

She also expresses her desire to revoke the power of attorney given by her as guardian of said minors to Theodore F. Barnes, to secure for them the right of additional entry, for the reason that said power was executed under a misapprehension.

Upon consideration of the facts above set out, your office by decision of June 29, 1885, adhered to its previous decision holding the entry made in the name of Mary J. Woolley for cancellation. It also declined to permit Mrs. Summers to withdraw the application made by her as guardian of the three youngest of the four minor children herein named, and further declines to recognize the revocation by her of the power of attorney given to T. F. Barnes to prosecute her claim in behalf of said three minor children.

In my judgment this was error. An applicant for public land has the right to any time withdraw his pending application and thus abate his claim. This is a matter within his own discretion, and I do not see that the authority to so exercise his discretion exists any the less in a guardian than in an applicant claiming for himself.

The decision appealed from states that "Mrs. Summers' appointment as guardian was to conserve the rights of her wards and not to waste or relinquish them," and gives this as a reason for refusing to allow her to withdraw her application or revoke the power of attorney given in connection therewith.

While the principle enunciated with reference to the purpose of the appointment of Mrs. Summers as guardian is without doubt correct, it by no means follows that her withdrawal of the application filed in behalf of her wards would operate adversely to their rights, or that it would in any degree tend toward a waste of that to which they as minor orphan children are entitled under the law. On the contrary, in view of the facts as presented by the record, her action indicates an intention and effort on her part to conserve the rights of her wards.

Besides, if she fails to act in good faith with said wards, that will be a matter for the consideration of the authority which appointed her guardian, and in the absence of anything on the face of the record tending to show fraud, it must be presumed that she has acted in good faith, as well as on her best judgment.

I find no reason for interfering with her discretion in offering to withdraw her claim as guardian. Having reached this conclusion, I must also conclude that she has full authority to revoke the power of attorney given to T. F. Barnes, since the withdrawal of the claim removes all necessity for his further employment in the case, if it does not of itself work a revocation. It may be added that it does not appear that Mr. Barnes objects to the proposed revocation.

The only remaining question is as to what is the proper course with reference to the entry already made in the name of Mary J. Woolley, the oldest of the four minor children. It has been canceled by your office decision appealed from, but the local office was instructed in said decision to permit no entry or filing for the land embraced thereby until further advised on the subject.

In view of the evident misapprehension under which the original application omitted to mention all the minor children and of the fact that an understanding appears to have been arrived at among the heirs by which under the entry already made their respective rights will be preserved, I do not see that there exists any necessity for the cancellation of said entry.

To cancel the entry would work a hardship upon those who hold as assignees the land covered by the entry, for it appears it has passed by sale and purchase. Moreover, the object of the law is to pass title under any valid claim to the party or parties entitled by virtue of such claim; and in this case, since it now appears who the parties are, patent may, I think, properly issue in the name of the minor orphan children of A. C. Woolley, deceased, though the entry in question was, through misapprehension, made in the name of but one of them. Under such a patent the rights of the several heirs will, if necessary, be protected by the courts, but as already indicated it does not seem at all probable that there will in this case be any occasion for an appeal to the courts for the purpose named.

Your office decision is reversed, and you will adjudicate the questions involved in accordance with the views herein expressed.

COAL LAND ENTRY; PRACTICE.

W. F. HAWES ET AL.

The qualification of each member of an association is an essential element in its right to make entry.

After an appeal from a decision of the General Land Office has been filed and accepted the case, without further action, must be forwarded to the Department for final disposition.

Acting Secretary Muldrow to Commissioner Sparks, November 12, 1886.

This record presents the appeal of W. F. Hawes, for himself and the Union Pacific Railway Company, and also as agent for Alfred R. King, Henry A. Tidd, Willis Mallory, and James Fiskens, from the decision

of your office, dated July 29, 1884, holding for cancellation coal entry No. 1, of Sec. 8, T. 14 S., R. 87 W., made June 6, 1883, by said King, Tidd, Mallory, and Fiskien, at the Gunnison land office, in the State of Colorado.

It is shown that Mallory and Fiskien on December 7, 1882, filed their coal declaratory statement No. 204, upon the N. $\frac{1}{2}$ of said section, alleging possession November 1, 1882, and that King and Tidd filed their coal declaratory statement No. 205, upon the S. $\frac{1}{2}$ of said section, on the same day, alleging possession thereof on November 1, 1882. Your office decided, on July 29, 1884, that the value of the improvements on each tract is only \$150; that the possession of the parties at date of entry is not shown nor alleged; that the agency of John Hopkins, who made the affidavit as to the character of said land, is not shown, nor is his affidavit corroborated as required by paragraphs 34 and 35, of circular approved July 31, 1882; that neither of the claimants made affidavit as required by paragraph 32 of said circular; that the only authority for allowing an association to enter 640 acres of coal land is by section 2348 of the Revised Statutes; that by section 2350 of the Revised Statutes only one entry can be made under said section by the same person or association of persons, and no association of persons, any member of which shall have taken the benefit of sections 2347-8-9, R. S., either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; that, if said entry should be approved, Mallory and Fiskien would acquire an interest in the S. $\frac{1}{2}$ of said section, and that King and Tidd would each obtain a benefit of more than one filing, which is inhibited by the law and regulations of this Department.

On September 22, 1884, counsel for said company, claiming to be the purchaser of said land from the parties who made the filings and entry, filed an application in your office, asking that said entry be corrected and that said parties be permitted to make entries of said land in accordance with their several declaratory statements as filed in said local land office, and also that an investigation be ordered to ascertain the regularity and validity of said declaratory statements and the rights of the respective parties.

On October 4, 1884, said Hawes filed in the local land office an appeal from said decision holding said entry for cancellation, and the same was transmitted to your office on October 9th ensuing. On October 28, 1884, additional proof was filed in your office by counsel for said parties in support of said entry. Other papers were subsequently filed in support of said motion. On October 21, 1885, your office considered said application for correction of said entry, and the papers filed in support thereof. The papers referred to are copies of two quit claim deeds from said declarants to said company, dated December 2, 1882, the consideration in each of said deed is two thousand dollars, and the grantors state in the deeds they intend to convey and assign to said

company "the right to purchase the above described coal land and complete the title to the same in the name of the parties of the first part," and your office found that if the parties filing said declaratory statements had any rights in said land by reason of their alleged possession from November 1 to December 2, 1882, they were transferred to said company on said last named date, by said deeds; that the possession alleged in said declaratory statements was the possession of the company as against the declarants, and that all parties appear to have so regarded it, since the company proceeded to make private cash entry, under Section 2347 of the Revised Statutes, instead of perfecting entry under Section 2348 of the Revised Statutes, and your office held that under the authority of the departmental decision in the case of *Kerr et al. v. Utah Wyoming Improvement Company* (2 L. D., 727) said entry could not be allowed to pass to patent.

I concur in the conclusion of your office that the record shows that said company is attempting to secure title to said section without furnishing the proofs required by law, and the regulations of the Department.

The record shows that the attorneys for claimants requested your office, on September 24, 1884, that, in view of their motion for a correction of the error in making said entry, no action should be taken on the appeal from said decision of your office, dated July 29, 1884, until said motion shall be disposed of. The appeal appears to have been filed in the local land office October 9, and received in your office October 15, 1884, and the decision refusing the motion was rendered October 21, 1885.

It has been repeatedly held by this Department that when an appeal has been filed and accepted, the only action that can be taken by your office is to forward the case to this Department for final disposition. *King v. Leitensdorfer* (3 L. D., 110); *Vannest v. St. P., M. & M. Ry. Co.* (5 L. D., 205).

A careful examination of the whole record discloses no error in said decision, and it is considered and adjudged that the same be affirmed.

MILITARY RESERVATION—NATIONAL CEMETERY.

FORT CUSTER.

Secretary Lamar to the Secretary of War, November 12, 1886.

Referring to the letter of Acting Secretary Benet of the first instant, enclosing the papers relating to the proposed military reservation for the post of Fort Custer, the national cemetery on the site of Custer's battlefield, and the limestone reservation, within the Crow Indian reservation in Montana Territory, inviting attention to the endorsement of the Lieutenant General of the Army, of the 25th ultimo, on letter

from this Department of the 9th of July last, and requesting to be advised whether the recommendation therein, to declare a reservation of 36 square miles, or six miles square, for Fort Custer, of which the center shall be the flag staff of the post, and a reservation of one square mile for the national cemetery of Custer's battlefield, will meet the approval of this Department, I have the honor to state that the letter with its enclosures was referred to the Commissioner of Indian Affairs for report, a copy of which is transmitted herewith, bearing date the 11th instant, and signed by the Acting Commissioner.

From the report of Indian Agent Williamson, resident at the Crow reservation, made to the Commissioner of Indian Affairs August 31st last, a copy of which is enclosed in the Acting Commissioner's report herewith, it appears that about thirteen Indian families have received allotments of land within the limits of the proposed reduced reservation for the post of Fort Custer, as designated in the endorsement of the Lieutenant General of the Army.

With the distinct understanding that the order to be prepared by the War Department for the President's signature, declaring this reservation, shall provide that these thirteen families shall not be disturbed, but shall be allowed to remain where they are now located, and to retain their present allotments of land, and be permitted the free and unrestricted enjoyment thereof unless they shall voluntarily release or abandon the same, this Department will interpose no objection to the declaration of the reservation as stated by the Lieutenant General in his endorsement of the 25th ultimo.

As to the limestone reservation, it may be declared or not, as your Department shall deem best; but I am of opinion such a reservation should be made.

PRACTICE—APPEAL—STAY OF PROCEEDINGS.

LOOP v. VOORHEES ET AL.

Pending appeal to the Department all proceedings should be stayed until final action thereon.

Secretary Lamar to Commissioner Sparks, November 13, 1886.

I have considered the case of Daniel T. Loop v. Charles Hamilton and James W. Voorhees, involving the timber-culture entry of the latter, made March 20, 1882, at Mitchell, Dakota, for the NE. $\frac{1}{4}$ of Sec. 11, T. 111 N., R. 69 W., said case being before me on the appeal of Hamilton from the decision of your office of April 11, 1885.

Approving of the conclusion arrived at in said decision, the same is hereby affirmed.

Since the pendency of said appeal in this Department, you transmitted the record of the contest by Loop against said entry, from which it appears that a hearing was had in said contest on September

25, 1885, and judgment rendered in favor of contestant on the next day, all of which was during the pendency of the appeal in relation to the right of Loop to contest said entry. This was irregular. All proceedings should have been stayed until the determination of the questions raised on appeal, but as no objection seems to have been made to such proceeding, the irregularity therein is not deemed sufficient to call for another hearing, and you will therefore adjudicate the case on the evidence and record as now before the Department.

APPRAISEMENT OF LANDS—REPORT.

FORT HAYS.

In case of action under the second section of the act of July 5, 1884, the appraisers must take the oath of office, unite in the examination and appraisal of the land, and submit their joint or several reports as to the value thereof.

Secretary Lamar to Commissioner Sparks, November 13, 1886.

I have received and considered your communication of the 27th ultimo, transmitting a report with accompanying papers, from two of the commissioners appointed to appraise a portion of Fort Hays military reservation in Kansas, under the act of June 11, 1884 (23 Stat., 40), authorizing the sale thereof to the Ellis County, Kansas, Agricultural Society, and recommending the approval of the same.

The report is herewith returned without approval, for the reason that only two of the three commissioners appointed to make the appraisal seem to have united in the discharge of that duty; and for the further reason that the two who did assume to enter upon the discharge of the duty of their appointment, do not appear to have properly qualified themselves under the law.

The act of June 11, 1884, authorizes the Secretary of the Interior to sell the lands in question to the Ellis County Agricultural Society, "on such terms as he may designate, for not less than the appraised value thereof, such value to be ascertained as in the case of other sales of lands subject to appraisal. This land being part of a military reservation, and having been turned over to the Department of the Interior by the War Department, commissioners to appraise its value preparatory to sale were appointed under the provisions of the 2nd Sec. of the Act of July 5, 1884 (23 Stat., 103), which provides that lands belonging to military reservations turned over to this Department, before being sold shall be surveyed, and "be appraised by three competent and disinterested men to be appointed by him, and who shall, after having each been duly sworn to impartially and faithfully execute the trust reposed in them, appraise the said lands, subdivisions, and tracts, and each of them, and report their action to the Secretary of the Interior for his action thereon." The land had already been surveyed.

It thus appears, clearly, that all three of the appraisers must qualify by being sworn, and must all unite in the duty of examining and appraising the lands. It does not follow, however, that they must all unite in making a joint report, or that they must all agree in their judgment as to the value of the lands. There might be a majority and minority report, as in many other cases. But they should act together in examining the lands and forming their opinion as to their value. Each one is entitled to the judgment of the other in the discharge of this duty.

The papers accompanying your letter show that only two of the appraisers, Hays and Covington, proceeded to the lands to make an examination and appraisal, while the third, Mr. Ely, remained away entirely. He afterwards wrote a letter explaining his absence, and objecting to the price at which the lands were appraised by the two. No evidence appears in the report of the two appraisers that they were sworn before entering upon the discharge of their duties. This is a necessary pre-requisite, and in the absence of such qualification by the appraisers their work would be invalid. The report should state that the appraisers were duly sworn, and the oath taken by each, before an officer authorized to administer oaths, should be transmitted therewith.

An appraiser has been appointed in the place of Mr. Ely, and his commission is transmitted herewith.

You will instruct the appraisers to re-examine the lands and make an appraisal thereof in accordance with the suggestions herein, submitting their report through your office.

HOMESTEAD ENTRY—CONTEST.

GREER v. BROWN.

Final proof not having been submitted, a contest is allowed, though not begun within seven years from the date of entry.

Secretary Lamar to Commissioner Sparks, November 15, 1886.

This record presents the case of J. H. Greer v. William E. Brown, on appeal by the former from the decision of your office, dated June 5, 1885, dismissing his contest against the latter's homestead entry No. 3294, of the NE. $\frac{1}{4}$ of Sec. 14, T. 9 S., R. 1 E., made November 12, 1877, at the Salt Lake land office, Utah Territory.

It appears that on December 8, 1884, said Greer filed in the local land office his affidavit of contest against said entry, alleging abandonment, change of residence, and failure to settle and cultivate said tract as required by law. Due notice was made by publication, fixing January 10, 1885, for the hearing of said case. The hearing was duly held, the entryman making default, and the contestant offered his testimony tending to show, among other things, that said Brown never resided

continuously on said tract, and that the present condition of the land is barren, grown up to woods, and without any improvements whatever.

Upon the testimony submitted, the local land officers recommended the cancellation of said entry, and reported on March 12, 1885, that they had mailed notice of said decision to the entryman, informing him that thirty days were allowed for appeal; that in case he did not appeal, said decision would become final; that the time allowed for appeal had expired, and no appeal had been filed. On May 22, 1885, the local land officers transmitted the application of said Brown to purchase said tract under the provisions of the second section of the act of June 15, 1880 (21 Stat., 237), filed May 18, 1885, and rejected by them for the reason that "contestant's right of entry attaches when the judgment in his favor becomes final, either of the local officers or on appeal." From this decision of the local land officers rejecting said application Brown appealed, and alleged that he never received notice of the decision of the local land officers.

Your office, on June 5, 1885, considered said appeal and held that the decision of the local land officers in holding said entry for cancellation was erroneous, for the reason that the entryman, according to the evidence presented by the contestant, complied with the requirements of the homestead law, and your office directed that Brown be allowed to perfect his entry, either by making final proof thereon, or, if he should so elect, he could purchase under said act.

A careful examination of the record fails to sustain the conclusion of your office. The testimony offered shows that Brown never complied with the homestead law as to residence, and although Brown avers that he did not get notice of the decision canceling his entry until after the expiration of the time allowed for appeal, yet he did not at any time file an appeal from said decision, nor did he allege that said decision was erroneous, or that he had complied with the requirements of the homestead law. On the contrary, Brown applied to make cash entry of said tract.

Although more than seven years had elapsed from the date of said entry prior to the initiation of said contest, yet the entryman had failed to make the final proof within the time required by law, and under the ruling of your office, in the case of *Kincaid v. Jefferson*, decided October 7, 1884, (3 L. D., 136,) the entry was subject to contest. The application to purchase was made after the contestant had furnished the testimony upon which the local officers recommended the cancellation of said entry, and no appeal was taken from their decision, and the application therefore came too late. See *Friese v. Hobson* (4 L. D., 580).

It appears that said application to purchase was returned to the local land officers by said decision of your office without any mention of the right of appeal, and they allowed the application and issued cash certificate No. 2814 on July 3, 1885. It follows that said cash entry must be suspended, the entry of Brown canceled, and if Mr. Greer shall duly

apply to enter said tract, his application should be allowed, and in that event Brown's cash entry should be canceled. The decision appealed from is modified accordingly.

PRACTICE—TIMBER CULTURE CONTEST.

GALLAGHER v. TARBOX ET AL.

A contest falling within the terms of the circular order of dismissal issued on the ruling in the Bundy case, and subsequently expressly held void from inception, was no bar to the reception of a second contest which should have been received and held for the final disposition of the former.

Secretary Lamar to Commissioner Sparks, November 15, 1886.

I have considered the case of Thomas Gallagher v. William H. Tarbox and Nelson Waldron, as presented by the appeal of the former from the decision of your office, dated August 20, 1883, sustaining the action of the district land officers of the Watertown office, Dakota Territory, rejecting his affidavit of contest against timber culture entry No. 2686 of the SW. $\frac{1}{4}$ of Sec. 34, T. 112, R. 56 W., made September 3, 1879, by said Tarbox.

The record shows that on February 16, 1882, Michael Todhunter filed his affidavit of contest against said entry, alleging that the entryman had failed to break and cultivate said tract as required by the timber culture law. Notice by publication was made, and the entryman failing to appear, the contestant submitted his testimony tending to prove the truth of his allegations. The papers were transmitted to your office on December 27, 1882, as appears from your office letter dated August 20, 1883.

On January 13, 1883, Gallagher filed his affidavit of contest against said entry, alleging failure to comply with the timber culture law, and, at the same time, filed his application to enter said tract under the timber culture law. The register made the following indorsement upon said application: "Rejected, case to Commissioner December 27, 1882, subject to appeal." On January 25, 1883, Gallagher by his attorney appealed from the register's decision rejecting his contest affidavit and application to enter said tract, upon the ground that the prior contest was illegal from its inception, for the reason that the contestant failed to make application to enter said tract at the time he initiated his contest.

On August 20, 1883, your office dismissed Todhunter's contest, "on account of the contestant not having filed an application to enter the land as required under section 3 of the act of June 14, 1878," and affirmed the action of the register rejecting Gallagher's application to contest. Todhunter did not appeal, and he is claiming no rights in this case.

On February 4, 1884, the register reported that Gallagher was notified of the decision of your office adverse to him, and of his right of appeal, that the time allowed for appeal has expired, and no appeal has been filed in the local land office.

On September 8, 1883, said Waldron filed his affidavit of contest against said entry, with an application to enter said tract, alleging failure to comply with the requirements of the timber culture law as to breaking, cultivation and planting. Notice was made by publication and November 14, 1883, was set for the hearing of the case. The entryman did not appear, but the contestant offered his testimony in support of his allegations, and the local officers held that said entry was forfeited and should be canceled.

On April 23, 1884, Gallagher by his attorney filed two affidavits, alleging that he never received any notice whatever of the decision of your office rejecting his application to contest said entry, and asked that the same be re-opened. On October 13, 1884, in response to your office letter of October 1, same year, the receiver reported that the records of the local land office "do not show the address of Thomas Gallagher, nor his attorneys, at the time of your decision dismissing his appeal from the action of the local office in rejecting his application to contest timber culture entry 2686 of Wm. H. Tarbox," and that by a mistake of their clerk notice of said decision was sent to the wrong attorneys by letter, dated August 28, 1883.

On January 15, 1885, your office, reviewing the proceedings heretofore had in the case, directed the local officers to allow Gallagher sixty days from notice hereof to appeal, and that he must serve notice of the same upon the adverse contestant Waldron. Gallagher filed his appeal in the local land office, with the acceptance of service, dated February 4th, same year, by the attorney of said Waldron.

The grounds of error alleged are:

- (1) That Todhunter's contest was illegal in its inception;
- (2) That the pendency of an illegal contest is no bar to the initiation of a legal contest.

No answer has been made or brief filed by the adverse contestant Waldron.

The record fails to show just what action was taken by the local officers upon Todhunter's contest, except that the papers were transmitted to your office, by letter dated December 27, 1882. It also appears that seven days prior to the transmission of the papers in Todhunter's contest, your office issued a circular to the registers and receivers, approved by the Secretary of the Interior, directing the dismissal of all contests similar to that of Todhunter's. This was twenty-four days prior to the application of Gallagher to contest said entry, and, besides, your office expressly ruled that Todhunter's contest was illegal in its inception, and said decision became final by failure of the contestant to appeal. Todhunter's contest having been found to be illegal, was no bar to the

receipt of the application of Gallagher to contest. *Tripp et al. v. Stewart* (2 C. L. L., 707). It should have been received, and when the judgment of your office, that the prior contest was illegal in its inception, had become final, Gallagher should have been allowed to proceed with his contest. *Durkee v. Teets* (4 L. D., 99); *Melcher v. Clark* (*ibid.*, 504); *Churchill v. Seeley* (*ibidem*, 589).

It is clear that Gallagher could not be deprived of his rights by the failure of the local land officers to notify him of the decision of your office. Since Waldron filed his affidavit of contest long prior to the expiration of the time within which Gallagher had the right of appeal, his rights must be held subject to those of Gallagher, who should be allowed to proceed with his contest, and in the meantime action upon the contest proceedings of Waldron will be suspended. You will therefore direct the local land officers to advise Gallagher that he will be allowed to proceed with his contest within a reasonable time (say ninety days), and submit testimony in support of his allegations.

The decision appealed from is modified accordingly.

TIMBER CULTURE ENTRY—FINAL PROOF.

GEORGE STEARLE.

Whether the final proof be submitted on an entry made under the act of 1874, or one of the subsequent acts, it must be specific with respect to the planting, cultivation, and growth of timber trees.

The written notice to a losing party should include a copy of the adverse decision.

Acting Secretary Muldrow to Commissioner Sparks, November 15, 1886.

This record presents the appeal of George Stearle from the decision of your office, dated October 1, 1885, affirming the action of the local land office suspending his final proof on timber culture entry No. 781 of the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 22, T. 9 N., R. 13 W., made August 22, 1874, at the Grand Island land office, in the State of Nebraska.

It appears that the entryman offered his final proof made before the clerk (ex officio) of the county court in said State, and the same was suspended by the local land officers, because the name of the entryman was spelled in a different manner in the proof from that in the entry papers, also for the reason that the proof failed, in answer to printed questions Nos. 3, 4, 5 and 6, to state how the witness knows the number of acres planted each year, or how he measured the ground, and also fails to state fully in answer to question No. 9 the number of trees growing upon each acre, and the means of knowledge by which the witness answers said questions. The local land officers also found that one of the witnesses had no knowledge of the claimant, or of the land at the time said entry was made, nor for several years subsequently, and that neither of the witnesses states in what manner their knowledge

was obtained as to the number of acres cultivated, or the size and number of trees planted thereon.

Upon appeal, your office affirmed the action of the local land officers, and held that each witness should know the claim from date of entry, and if no such witness can be procured, then the claimant should make an affidavit to that effect.

The claimant appeals, and insists that "the decision was contrary to law." In the argument of counsel it is strenuously contended that the register erred in not giving counsel a copy of the decision of your office, instead of stating the effect of it, and that since said entry was made under the timber culture act of March 13, 1874 (18 Stat., 21), under the circular of instructions issued February 1, 1882 (1 L. D., 28), a claimant who made entry under said act of 1874 is not required to show the manner of planting the trees, and if he shows himself qualified, that the proper number of trees were planted, and cultivated for the required length of time, and that at the time of offering final proof the trees are of ordinary size and thrift, the claimant has complied with the requirements of the timber culture law.

Section 7 of the act of 1878 (*supra*) provides "that parties who have already made entries under the acts approved March 3, 1873, and March 13, 1874, of which this is amendatory, shall be permitted to complete the same upon full compliance with the provision of this act; that is, they shall, at the time of making their final proof, have had under cultivation, as required by this act, an amount of timber sufficient to make the number of acres required by this act."

The circular of February 1, 1882, (*supra*.) states that, "Section 7 of the act (June 14, 1878,) defines the meaning of the term 'full compliance,' as used in that section. It is that the parties shall show that they have under cultivation, as required by the act, an amount of timber sufficient to make the number of acres required therein; that at the time of making final entry the required number of living and thrifty trees are growing on the land."

It is further stated in said circular that in making proof under the act of 1878, it is not necessary that the manner of planting under that act should be shown to have been followed by parties making entry under said prior acts, but that if there have not been eight years of cultivation, or if there are not the requisite number of living, thrifty trees growing on the land at the expiration of eight years from date of entry, then final proof can not be made until these requisites shall have been complied with, and the local land officers are required to carefully examine the evidence when final proof is offered, and if they find the same sufficient, they will issue the final certificate upon payment of the final commissions allowed by law.

The general circular issued March 1, 1884, continues in force the provisions of said circular of February 1, 1882, and prescribes the forms to be used (see pages 31, 93, and 94).

It is clear that the claimant failed to comply with the requirements of said circulars, and the local land officers very properly suspended said proof. It has been repeatedly held by this Department that the claimant is entitled to notice in writing of an adverse decision, either by the local land officers or by your office. Rule of Practice No. 17 (4 L. D., 39); *Ballard v. McKinney* (1 L. D., 483); *Elliott v. Noel* (4 L. D., 73); *Churchill v. Seeley et al.* (*Ibid.*, 589).

It is not enough that the local land officers inform the losing party of the effect of the decision adverse to him, he should be furnished with a copy of the decision, in order that he may fully understand the same and appeal therefrom, if he so desires. In the case at bar, however, it is considered that the claimant has not furnished proof sufficiently explicit, and the decision of your office and the local land office suspending the same is accordingly affirmed.

PRACTICE—APPEAL—CERTIORARI.

CASSIDY v. AREY.

A review of the Commissioner's action cannot be secured by certiorari when the right of appeal is lost through failure to file in time.

Acting Secretary Muldrow to Commissioner Sparks, November 15, 1886.

In the case of *David W. Cassidy v. Irene H. W. Arey*, involving the SE. $\frac{1}{4}$ of Sec. 18, T. 108 N., R. 47 W., Mitchell, Dakota Territory, your office on the 17th of March last rendered a decision adverse to Mrs. Arey, and held for cancellation her cash entry No. 6649 embracing the tract specified.

It appears from the records that the time in which an appeal from the decision could have been filed expired June 6th following. No appeal then having been filed, said cash entry was thereupon canceled. On the 13th of August last an appeal was filed on behalf of Mrs. Arey, but your office refused to accept it, because not filed within the time prescribed by the rules of practice. Thereupon was filed an application for certiorari under the rules, and the same has been very fully considered by me.

The motion alleges that great hardship is imposed upon Mrs. Arey by your said decision of March 17th last, while at the same time admitting that her legal rights in the premises were lost by failure to appeal as above stated. But it is urged that the case is one in which the supervisory power of the Secretary of the Interior should be exercised as provided in Rule 114.

I am unable to see the force of this contention. Whatever rights Mrs. Arey might have had in the land in controversy were lost by her failure to appeal from the said decision holding her entry for cancellation. It is a rule in this Department, grown into use because it is

reasonable and because it subserves the public interests and is for the good of the practice, that certiorari will not lie where the appeal was properly denied because not filed in time. Chicago, Milwaukee & St. Paul R. R. Co. (2 B. L. P., 324). And further it has been lately ruled here that where the rules of practice are not in conflict with the law, and have prescribed a plain and adequate course of procedure, they are to be followed; that in such cases there is no occasion for invoking the supervisory power of the Secretary of the Interior; and that it will not then be exercised. *Stevens v. Robinson* (5 L. D., 111).

Said application is therefore denied.

IOWA SWAMP LANDS.

HARDIN COUNTY.

In adjusting claims for swamp indemnity, the Commissioner of the General Land Office is authorized to order re-examinations in the field of the land for which indemnity is claimed.

Secretary Lamar to Commissioner Sparks, November 15, 1886.

On the 10th of September last, Hon. D. B. Henderson, of Iowa, addressed to this Department a communication, inclosing letters from J. Q. Rathbone, Auditor of Hardin County, Iowa, and Isaac R. Hitt, agent, respectively, relative to certain claims for swamp land indemnity under the provisions of acts of Congress of September 28, 1850 (9 Stat., 519), and March 2, 1855 (10 Stat., 634). These letters were called out by a communication, dated August 23, 1886, from your office to Mr. Rathbone, in which he was advised that certain lands on account of which indemnity is claimed "must be re-examined by special agent before the account can be satisfactorily made up, which examination will be made at the earliest practicable day." The communications from the parties herein mentioned constitute a protest against the proposed action of your office as indicated in the quotation above made from your office letter of the 23d of August last, and ask of me a review and reversal of that decision on the ground, substantially, that the law has been complied with in the examination and report already made, and that there is no warrant of law in forcing a settlement upon the basis of a re-examination. The matter was referred to your office for report, and in response to the reference I have before me your report, dated October 20th ultimo.

Said report, after reference to the provisions of the act of 1850 granting swamp lands, and to the act of 1855 providing for indemnity for lands granted by the act of 1850, but subsequently sold or otherwise disposed of, proceeds to discuss the claim covered by this protest. It

states that the report of the special agent of your office, who made an examination in the field of the lands for which indemnity is claimed, together with the testimony taken in his presence as to the character of the lands, and submitted by the county of Hardin, the grantee of the State of Iowa, reached your office in March last. It further states that "It was found that a large percentage of the lands is shown by the field notes not to be swamp or overflowed 'within the true intent and meaning' of the grant of 1855, and in view of this it was deemed best for the interests of the government to have the lands covered by all pending claims of this class re-examined in the field by new agents."

You state that where re-examinations have been made the result has been a great saving to the government. The contention of protestants that there is no authority of law for ordering a re-examination in these cases can not, in my judgment, be maintained. The evidence already presented as to the claim under consideration certainly does not bind your office or the Department to a final adjudication in case said evidence is not deemed satisfactory or sufficient for that purpose. To hold that it does would be contrary to reason and would, in effect, lead to the final adjudication, certification and passing of rights and titles in violation of the law, which, as to claims of the class here in question, requires "due proof before the Commissioner of the General Land Office." Who is to be the judge as to whether the evidence constitutes due proof? Manifestly the Commissioner of the General Land Office, who is to pass upon the proof, and whose action thereon is subject to approval by the Secretary of the Interior.

The Department recently had before it in the case of certain swamp land claims in the State of Oregon (5 L. D., 31), questions kindred to that here involved. In that case I took occasion to use the following language relative to lands granted by the swamp-land act: "While the Department has adopted general methods for designating such lands, the Secretary is not restricted to any plan, but may adopt and employ such agencies as may in his judgment satisfactorily determine what lands are of the character granted by the act." If the method of ascertaining the character of the land may be changed at any time in order to reach a satisfactory determination, and thus meet the requirements of the law, I see no reason why a method in vogue may not be employed to its fullest extent, even to further examination in the field, as proposed in this case, if that is deemed necessary. As stated by you, the law does not limit the scope of the inquiry; neither does it prescribe the manner in which it shall be prosecuted.

Concurring in the views expressed in your report, and finding nothing which would justify my interference with your discretion in the matter, I must decline to accede to the request contained in the protest before me.

HOMESTEAD CONTEST—ABANDONMENT.

HOUF v. GILBERT.

Abandonment is not established by evidence showing frequent and protracted absences following entry, where the entryman had, prior to entry, resided upon and improved the land for a term of six years under contract with a railroad company for whose benefit the land was then withdrawn.

Secretary Lamar to Commissioner Sparks, November 15, 1886.

I have considered the case of Milton Houf v. John R. Gilbert, as presented by the appeal of the latter from the decision of your office, dated May 21, 1885, holding for cancellation his homestead entry No. 2213 of the SW. $\frac{1}{4}$ of Sec. 21, T. 6 S., R. 8 W., made August 1, 1883, at the Helena land office, Montana Territory.

The record shows that said tract was within the limits of the withdrawal for the benefit of the Northern Pacific Railroad Company, upon the filing of its map of general route April 22, 1872, that Gilbert settled upon said tract in 1876, made valuable improvements upon the same, and continued to reside thereon with his family until July, 1882, under a contract of purchase from said company. On August 1, 1883, said land was restored to the public domain, and on that day said Gilbert made said homestead entry, his affidavit having been executed before an officer of the county in which said tract is situated.

On March 15, 1884, Houf filed his affidavit of contest against said entry, alleging that said Gilbert had wholly abandoned said tract; that he has not resided thereon for more than six months since making said entry, and that Gilbert has not resided on said land with his family since he made his homestead entry on August 1, 1883. On March 20, 1884, notice issued, summoning said Gilbert to appear at the local land office on April 30th ensuing, and answer the charge "that he has wholly abandoned said land for more than six months last past." The testimony was taken before an officer in the county where the land was situated, and that of the claimant tends to show that said Gilbert settled upon said land in 1876, and made improvements of the value of more than two thousand dollars; that he lived upon the land continuously with his family from 1876 until 1882; that his leg was broken in 1880 and he was unable to do manual labor in consequence thereof; that in 1882 he sought and obtained employment as superintendent of the Helena Mining and Reduction Company, some seventy miles away; that he removed his family to the place where he was engaged as a superintendent; that his wife was sick and unable to come back to said land until April, 1884, and that the claimant was on the land at the time of making said entry, and that his absence was only temporary. The testimony of contestant tends to prove that said Gilbert has not resided upon said land with his family since the date of his entry and prior to the initiation of the contest.

Upon the evidence submitted the local land officers held that it was not competent to consider the acts done by the claimant on said tract prior to the date of said entry, for the reason that prior to that time he could not acquire any right to said tract as against the United States; that since the date of his entry Gilbert has not resided upon said tract, and that his entry should be canceled. On appeal, your office concurred with the opinion of the local land officers that the acts of the entryman prior to the date of the entry ought not to be considered; that the evidence showed that the entryman had not acted in good faith, and that his said entry should be held for cancellation.

It is insisted by the appellant that said decision is erroneous in holding—

- (1) That the testimony relative to improvements made upon the tract during its withdrawal should not be considered as material;
- (2) In holding that Gilbert did not act in good faith; and
- (3) In not dismissing said contest.

While it is true that the entryman could acquire no rights as against the United States by virtue of his acts done prior to the date of said entry yet it does not follow that upon a charge of abandonment, such acts showing residence and valuable improvement upon the land are not proper subjects of inquiry.

This Department held in the case of *Geer v. Farrington* (4 L. D., 410), that as between settlers upon tracts covered by an uncanceled entry priority of settlement may be properly considered. It has been repeatedly held by the courts and this Department that it is immaterial whether the settler purchases improvements already upon the land or caused the same to be made after settlement. *Timmons v. Gleason* (2 C. L. L., 551); *Pruitt v. Chadbourne* (3 L. D., 100); *Kurtz v. Holt* (4 L. D., 56); *Lansdale v. Daniels* (10 Otto, 113).

It will be observed that Gilbert was not a trespasser upon said land prior to the withdrawal. *Peterson v. Kitchen* (2 C. L. L., 552). His valuable improvements were made while he had a contract of purchase with said company, he had lived with his family on the land continuously for a longer time than was necessary to acquire title if said tract had been relieved from the withdrawal, and at the date of the hearing his family was living upon the land.

It is strenuously insisted by counsel for the contestant that said Gilbert committed perjury when he made said homestead affidavit, for the reason that at that time his family was not living on the land. But it has been repeatedly held by the Department that residence is established from the moment the settler goes upon the land with the intention in good faith of making his home there to the exclusion of one elsewhere. *Humble v. McMurtrie* (2 L. D., 161); *Grimshaw v. Taylor* (4 L. D., 330). If Gilbert was on the land when he made said affidavit, and had the *bona fide* intention of continuing his home there, then in contemplation of law his residence was on said tract, and no perjury would

be committed if his family was temporarily absent. It is shown by the affidavit of a physician and by other testimony that the wife of said Gilbert returned to the land as soon as she was able, and although the testimony shows that Gilbert went to the land only three or four times prior to the initiation of said contest, it does not sufficiently appear from a careful examination of the whole record that he in fact intended to or did abandon said tract.

It follows from the foregoing that said decision is erroneous and must be reversed.

TIMBER DEPREDATIONS—SETTLEMENT OF CLAIMS.

A claim of the government arising from timber depredations is for an unascertained amount which the Secretary of the Interior may properly find and determine, and effect settlement for with the trespasser by receiving payment in full. The amount of such a claim having been duly ascertained and fixed, there is no authority in the Department to compromise the same by receiving in payment therefor a less sum than the amount found to be due.

Secretary Lamar to the Secretary of the Treasury, November 15, 1886.

I am in receipt of a communication from the Solicitor of the Treasury of May 13, 1886, relating to the question of the authority of this Department to compromise and settle timber depredation cases, referring to the opinion of the Attorney General, submitted January 8, 1880, upon this subject.

In his communication (with reference to this opinion) the Solicitor of the Treasury says: "I am informed that since the date of this letter from the Attorney General, a copy of which was furnished your Department about the time it was received, all applications for compromise of claims in favor of the United States arising from trespasses have been considered and disposed of as provided for in Section 3469, R. S." (excepting certain cases therein referred to). Then referring to the regulations issued by the Commissioner of the General Land Office, authorizing special agents to receive and consider propositions to settle claims in favor of the United States arising from trespass, where the same were not wilfully committed, says: "I know of no authority by which an executive officer can compromise and settle a claim in favor of the United States, except that conferred by Sections 295, 409, 3229 and 3469, Revised Statutes." He brings the subject to my attention with a view of securing some uniform action. To this end I submitted the communication to the Commissioner of the General Land Office for report, which is now before me, a copy of which I also transmit herewith.

The Commissioner of the General Land Office, doubting the authority of that office or of this Department to settle and compromise such cases, recommends that the practice heretofore followed of entertaining propositions in that office, and this Department for settlement of timber trespasses be discontinued.

While I concur fully in the opinion of the Solicitor of the Treasury that there is no authority by which an executive officer can compromise a claim in favor of the United States, except that conferred by section 3469, I do not consider said section as a restriction upon the authority of any executive officer to settle a claim in favor of the United States where such settlement is not the result of a compromise, but a settlement in full payment of the entire amount due the government on such claim, and where such settlement is made by the Department having control and jurisdiction of the subject matter.

The authority conferred by Section 3469 is alone necessary to be considered in the investigation of this subject. That section provides that, "Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be *compromised*, and recommending that it be *compromised* upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary of the Treasury is authorized to *compromise* such claim accordingly. But the provision of this section shall not apply to any claim arising under the postal laws."

After a careful consideration of the question of authority of an executive officer to compromise a claim in favor of the United States, except as provided for by the section above quoted, and of the character of claims arising from timber depredations and the authority to settle the same as exercised by this Department, I have been unable to concur with the views of the Solicitor of the Treasury, or the recommendation of the Commissioner of the General Land Office, that no proposition for the settlement of timber depredation claims should in the future be entertained by this Department, or that the settlement of such claims effected through it is the exercise of a doubtful authority.

It seems to me apparent that the difference of opinion as to the authority of this Department to settle timber depredation claims arises from the use of the words "compromise" and "settlement" in the same sense, or else the impression must prevail that the settlement of such claim, as now authorized and executed by this Department, is a settlement made upon a compromise of a specific amount found to be due.

Speaking of the regulations issued by the Commissioner and addressed to special agents, the Solicitor of the Treasury says, that such regulations "contemplate that they may receive and consider propositions to settle claims in favor of the United States arising from trespass where the same were not wilfully committed," and adds "I know of no authority by which an executive officer can compromise and settle a claim in favor of the United States except that conferred by Sections 295, 409, 3229, and 3469, R. S." If it is intended by this that no authority exists in this Department to settle a claim upon a compromise of the amount found to be due, I concur in that view; but if it is intended that there is no authority in this Department to ascertain and determine

what amount is due, and to settle such claim by receiving the full amount so found to be due, I do not concur.

A compromise implies a mutual concession, or an agreement to receive in payment a less sum than the amount found to be due; and it is in this sense that the term is employed in Sec. 3469. I do not understand that the settlement of such claims as authorized by this Department is a settlement of that character.

The general power and authority conferred upon this Department respecting public lands includes the duty and authority to protect from depredation the timber thereon, and to seize what is cut and taken away from them wherever it may be found. It follows that in the exercise of that power and duty this Department has full authority to ascertain and determine under the law the extent of such depredation, the value of the timber cut and destroyed, the character of the trespass, and when the amount of the claim has been ascertained, to receive payment of the full amount of such claim in satisfaction thereof. *Wells v. Nichols* (104 U. S., 447); *Wooden Ware Company v. United States* (106 U. S., 432).

In the execution of this power and duty, special agents have been appointed, who are directed to investigate and report upon all cases of timber trespass, and to receive propositions for settlement of the same. The instructions issued to special agents require the trespasser to submit with his proposition for settlement a sworn statement showing the character of the trespass, the amount of the timber, its value when standing in the tree, when felled and cut into logs, when delivered at the landing, when delivered at the mill, when manufactured into lumber, and its value in its position and condition when purchased by the party in whose possession it was found.

In respect to the character of the trespass, the Supreme Court, in the case of *Wooden-ware Company v. The United States*, *supra*, have announced certain rules which have been embraced in the instructions to special agents. Under the sworn statement so furnished, and the rules adopted for their guidance, the special agents investigate and report upon the claim, by which means the amount due the government is officially ascertained and determined. A claim due the government arising from timber depredations is a claim for an unascertained amount, which the Secretary of the Interior, through the officers and agents of this Department, finds and determines. A settlement made with the trespasser by receiving payment of the amount so found to be due is in no sense a compromise, but payment in full of the claim due to the government; and I can see no reason for invoking the action of the judicial department to ascertain and determine that which the executive department in the scope of its authority has already determined, or to enforce payment by suit when the trespasser offers to discharge his liability without suit.

The special agents may report the character of the trespass, the amount and the value, or either of these facts, different from that shown by the sworn statement of the trespasser. As for instance, the trespasser may claim that he is an innocent purchaser from an unintentional trespasser, and may offer to pay the value of the timber at the time when taken. The special agent may report that the trespass was willful, of which the purchaser had notice, and may recommend settlement at the full value of the property at the time and place of demand. Upon further investigation by the special agent, or upon examination by the Commissioner or the Secretary, it may be determined that the purchase was made without notice of wrong, but from a willful trespasser, and that the timber should be settled for at the value of the property at the time of purchase, to which the trespasser may agree and settle. While the amount paid may be greater than the amount originally offered, and less than the amount originally reported by the government officials, it is not a compromise of the claim, but a determination from the facts of the case of the amount due the government.

If after that amount has been ascertained, the trespasser either declines to pay, or is unable to pay it, but offers a less amount, there is no authority in this Department to compromise the claim, but the future control of the case should be left with the Department of Justice.

This question was incidentally passed upon by the Solicitor General, acting as Attorney General, in his letter of August 23d last, addressed to this Department, relative to the seizure of timber taken from the public lands, from which I infer that the Department of Justice concurs in the view herein expressed; but as this question was not directly involved in the matter referred to, I do not feel at liberty to claim it as authority for this opinion.

Being satisfied that this Department not only has authority, but that it is its duty to take jurisdiction of and to settle all such cases in the manner herein stated, I have for this reason so fully presented the matter for your consideration, with the request that if you should not agree in this opinion you will concur in submitting the matter to the Attorney General for his opinion thereon.

AGRICULTURAL COLLEGE LANDS—RES JUDICATA.

STATE OF KANSAS.

Final adjudications of the Department will not be disturbed on the mere allegation of error in construing the law.

Secretary Lamar to Commissioner Sparks, October 25, 1886.

The act of July 2, 1862 (12 Stat., 503) granted to the several States which would provide colleges for the benefit of agriculture and the mechanic arts a quantity of land to be apportioned to each State, equal to thirty thousand acres, for each senator and representative in Congress to which the States were respectively entitled by the apportion-

ment under the census of 1860. The act further provided: "Sec. 5—
"Fifth. When lands shall be selected from those which have been
"raised to double the minimum price, in consequence of railroad grants,
"they shall be computed to the States at the maximum price and the
"number of acres proportionally diminished." Under the provision of
said act, on November 3, 1864, the State of Kansas selected the lands
in controversy herein, embraced in "List 3."

7,682.92 acres, so selected, were within even numbered sections, and
fell within the limits of a withdrawal for the benefit of the Leavenworth,
Pawnee and Western Railroad, made July 17, 1862, were held to be
double minimum lands, and were certified to the State on October 16,
1865, as in satisfaction of double their area.

In March, 1880, Hon. S. J. Crawford, as attorney for the State of
Kansas, addressed a communication to the Secretary of the Interior,
claiming that the lands certified to the State as double minimum were
not legally double minimum, and that the State was entitled to select
an additional amount of lands equal to the amount so certified. This
claim of the State was denied by your office January 17, 1881, it being
held that under the provisions of the act of March 3, 1853 (10 Stat.,
244), the even sections within the limits of the withdrawal of July 17,
1862, were properly rated at the double minimum price. The case came
before this Department, on appeal, and on May 13, 1881, the judgment
of your office was affirmed. Motion for review was filed, the questions
involved were submitted to the Attorney General, and that officer, on
June 17, 1881, held that the State of Kansas "has now no further claim
to lands under this act of July 2, 1862."

Thus the matter rested until June 1, 1885, when the attorney for the
State filed in this Department an application for review of said decision
of May 13, 1881, alleging certain errors in construction of the law gov-
erning the case. This application was referred to your office in the
usual course of business for "examination and recommendation." By
letter of June 26, 1886, your office reported all the facts in the case, and
recommended that said State be allowed to select 7,686.47 additional
acres under said act.

I am unable to concur in such recommendation. All the questions
now arising in this case were fully presented to your office and to this
Department in 1881, and received careful attention in both tribunals.
In addition, the questions involved were submitted to the Attorney
General, and that officer, in an elaborate opinion, concurred in the views
of this Department. The decision rendered May 13, 1881, remained
unquestioned for four years, and now, after that interval, the issues
therein raised are presented anew, on the mere allegation of error in
construing the law. To open the case now, on such showing, would be
to invite the re-examination by this Department of all questions decided
during that time, in which errors of law might be alleged. Such an
undertaking cannot be assumed. It is entirely opposed to the practice

of courts and of this Department. I must therefore decline to re-examine the questions involved, as here presented, and the application is accordingly denied.

ACCOUNTS—LOCAL OFFICE.

CIRCULAR.

Commissioner Sparks to receivers of public moneys, November 6, 1886.

In order to secure uniformity in the preparation of your accounts relative to moneys received for reducing testimony to writing, and for clerical services rendered in contest cases, under the act of August 4, 1886, the following method will be observed:

You will credit the United States in your accounts as receiver with the gross amount of all fees received for reducing testimony to writing, except such sums as are paid by you for clerk hire in contest cases, which sums must be deducted from the gross proceeds received, and should not be included in the amounts so credited. You will also debit the United States with your deposits of such receipts exclusive of the amounts for clerk hire referred to above. In the special disbursing accounts for clerical service in reducing testimony in contest cases, you will credit the United States with the amounts of the deposits made by contestants and that were necessary to pay for clerk hire, in reducing such testimony, and will debit the United States with disbursements for that service, supporting the account with sworn statements and proper vouchers. This account should exactly balance.

The excess of receipts from fees over the expenses of clerical service must be reported in your receiver's weekly statements, monthly fee statements and in your quarterly and monthly accounts-current.

You will also report in detail on your receiver's monthly statements, form 4-146, all receipts for reducing testimony to writing, and also enter on the same the expenses incurred for clerical service.

Approved:

L. Q. C. LAMAR,

Secretary.

PRACTICE—FAILURE TO APPEAL FROM LOCAL OFFICE.

MORRISON v. MCKISSICK.

Under Rule 48 of Practice failure to appeal may be conclusive as to the rights of the parties, but will not preclude the Commissioner of the General Land Office from reviewing the decision of the local office.

Secretary Lamar to Commissioner Sparks, November 18, 1886.

Charles McKissick made homestead entry of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, T. 133 N., R. 48 W., Fargo, Dakota, September 23, 1881, and commuted the same to cash entry October 7, 1882.

November 9 following, John Morrison filed an affidavit of contest, alleging first, "that McKissick has not resided continuously on the land, but has abandoned it for more than six months; second, that his family have never resided on the place;" and third, that notice of final proof was not published in a paper nearest the land. This affidavit of contest was transmitted to your office under Rules of Practice 6 and 7, upon which a hearing was ordered.

By agreement of parties testimony was taken and reduced to writing before the clerk of the district court for Richland county, Dakota Territory, on which the local officers rendered the following decision:

"Upon a careful consideration of the evidence in the case, we are of the opinion that the plaintiff has failed to establish the truth of his allegation, or to make out a case against the defendant, and that the contest should be dismissed."

From this decision Morrison failed to appeal.

Your office reversed the action of the local officers, and held that the contestant did establish his allegation of non-residence; that the claimant's plea of poverty and feeble health was not a satisfactory excuse for his absence; that he had ample means and opportunity to establish and maintain his residence on the land, and failed to do so because he found employment elsewhere more remunerative. For these reasons, you held his entry for cancellation, and allowed the preference right of contestant in the event of final cancellation of the entry.

From this action McKissick appealed, alleging among his grounds of appeal—

"That the Honorable Commissioner erred in taking jurisdiction of the case to render the decision complained of, the district officers having agreed in finding from the testimony that the allegations of the contestant were not sustained, and no appeal having been taken from their finding."

Counsel for claimant in support of this denial of the jurisdiction of the Commissioner rely upon the 48th Rule of Practice, which is as follows:

"In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case, and will be disturbed by the Commissioner only as follows:

"1st. Where fraud or gross irregularity is suggested on the face of the papers.

"2d. Where the decision is contrary to existing laws or regulations.

"3d. In event of disagreeing decisions by the local officers.

"4th. Where it is not shown that the party against whom the decision was rendered was duly notified of his right of appeal."

By reference to the preceding rules (44 and 46), embraced in this chapter, it is apparent that this rule was only intended to apply to parties with reference to their rights as between themselves, and not to operate as a restriction upon the power or authority of the Commissioner to reject or approve the finding of the local officers upon a question of fact, or their decision upon the law applicable thereto. The

action of the register and receiver is in no sense final as to the rights of the government, but in all cases their decision either upon the law or facts is subject to the approval of the Commissioner, whether directing the cancellation of an entry or approving it for patent. If the decision of the register and receiver has no force or effect to direct the cancellation of an entry, or to authorize the issuance of a patent, unless approved by the Commissioner, it follows that their decision would be inoperative, whether appealed from or not.

To give to rule 48 the effect contended for by counsel for McKissick would require the Commissioner to approve the findings of the local officers not appealed from on all issues of fact, although such finding might be contrary to his own judgment of what facts had been proven by the evidence submitted. The approval required of the Commissioner is not simply a ministerial act, but the decision of a tribunal especially charged with the duty of determining from the evidence whether the law has been complied with, and in the discharge of this duty the whole record of the case should be considered by him as if it had been submitted to him originally for his decision thereon.

While the failure of Morrison to appeal may be treated as a waiver of whatever right he might have acquired by pursuing his contest to a successful determination, yet as between McKissick and the government the Commissioner committed no error in taking jurisdiction of the case to determine from the evidence whether McKissick had sufficiently complied with the requirement of the law to entitle him to patent, and if not to direct the cancellation of his entry.

Waiving all other questions, it appears from his own statement that he never established an actual residence on the land, and failing to do so within six months from the date of his entry, it was subject to cancellation.

The case made by his own statement is this: He broke and cultivated the land in the summer of 1881, and the same summer made entry and built a shanty, twelve by fourteen feet. During the year 1882 he and his wife were in the employ of the Dwight Farm Company. Their term of service commenced in April, but he does not state whether April, 1881, or April, 1882. In March, 1882, he built a house on the land, which was occupied by John Morrison as his tenant, who worked the claim on halves. He first stayed on the land one night with his wife and family about the latter part of May, 1882, and was again on the land with his family about the last of June, 1882, and remained one night, and again stayed one night in August. His wife was taken sick in September, 1882, and he was taken sick shortly thereafter. He states that he was often on the claim in the day time during the summer of 1882, and made final proof in October, 1882.

McKissick's entry should therefore be canceled, and the land will be held subject to entry by the first legal applicant. The decision of your office is modified accordingly.

HOMESTEAD CONTEST—PRACTICE.

THOMPSON v. LANGE.

Failure to appeal from an adverse decision not excused on the plea of want of notice where the record shows notice to the attorney.

The preliminary affidavit having been made before a clerk of the court, instead of the local office, the entry was voidable, but the defect might be cured before the intervention of an adverse claim.

Secretary Lamar to Commissioner Sparks, November 18, 1886.

In the case of Hayden M. Thompson v. John H. C. Lange, involving the SE. $\frac{1}{4}$ of Sec. 13, T. 110 N., R. 55 W., Watertown, Dakota Territory, a motion for review and reconsideration of my decision, rendered June 17th last (not printed), has been filed on behalf of Thompson.

Said decision affirmed the action of your office and also that of the local office in the case, awarded the above mentioned tract to Lange under his homestead entry made May 18, 1881, and rejected the homestead application and the contest of Thompson. The grounds upon which the decision was based were: 1st. That Lange was the prior settler upon the tract and had acted in good faith in the matter of his claim; 2d. That the irregularity or informality in the matter of Lange's entry had been cured prior to the initiation of Thompson's contest against it; and 3d. That whatever rights Thompson might have asserted by virtue of his settlement were lost by his failure to appeal from the action of the local office in rejecting his homestead application August 13, 1881.

The motion for review sets up six specifications of error in the decision complained of, the first three of which relate to and combat my third finding above. It is strongly insisted that the record fails to show that Thompson was notified of such rejections, etc. Now, as a matter of fact, the record does show that Thompson's attorney was notified; for, he says, "Thompson, within three months after May 22, 1881 (the date of his alleged settlement), submitted his application and affidavit in due form, and tendered \$14 homestead fees to the land office at Mitchell; and the money and papers were returned to his attorney at De Smet, because of the adverse filing of Lange." See also testimony, page 3 of record. Upon this state of facts it was not error to rule as I did in the decision complained of. I was simply following the rule laid down in the case of Wesley A. Cook (4 L. D., 187), where the facts as to notice were substantially the same as in this case.

This point being settled, it matters not which was the prior settler on the tract, for Thompson is restricted to the rights he may acquire by virtue of his contest, and if Lange at the date of the initiation of said contest had cured the irregularities and informalities in the matter of his homestead entry, the contest of Thompson against it was properly dismissed. It is admitted on all hands that Lange settled upon

the land at least by May 31, 1881, and that his residence thereon was continuous until the initiation of Thompson's contest, March 16, 1882.

The defect in the Lange entry consisted in this: that his original affidavit was made May 16, 1881, before the clerk of the court within and for Kingsbury County, Dakota Territory, under Sec. 2294 U. S. Revised Statutes, whereas it should have been made before the register and receiver, as provided in Sec. 2290, inasmuch as Lange had not at that date established his residence upon said tract. But the record of these proceedings shows that Lange filed a supplemental homestead affidavit and application on the first of March, 1882, fifteen days before the contest was initiated. This proceeding cured the defects in his original entry, which was not *void*, but merely *voidable*. See *St. P. M. & M. Ry. Co. v. Forseth* (3 L. D., 446).

It seems clear from this recital of record facts that I did not err in ruling that the irregularity or defect in the matter of Lange's entry had been cured prior to Thompson's application to contest. This proposition seems too clear to require argument.

Neither is there anything in the late case of *Martin v. Osborne*, decided by me Sept. 28th last (not printed) that conflicts with the view above taken, as suggested by counsel for Thompson. In that case, both the pre-emption declaratory statement of Osborne, and the homestead entry of Martin, were canceled, because neither of them had ever resided on the tract there in controversy. It was further stated, however, that Martin's homestead entry was also "defective," because made under Sec. 2294, when no member of his family was residing upon the land embraced therein; and in that case no application had been made to cure such defect. The defect not cured in the Martin entry was merely an *additional*, and not a *controlling*, reason for its cancellation. It was not said that the Martin entry was *void* and could not have been cured, nor was such a proposition entertained in relation to it.

This disposes of all the specifications of error in said motion; and as they or none of them are considered to be of sufficient force and effect to warrant a revocation of the decision herein complained of, said motion is accordingly denied, and the original decision in the case adhered to.

PRE-EMPTION—FILING—HOMESTEAD.

CATHRAN v. DAVIS.

The settlement of a pre-emptor who does not file his declaratory statement is not protected from the subsequent homestead entry of another who complies with the law.

Secretary Lamar to Commissioner Sparks, November 18, 1886.

On April 17, 1881, one William Boyce made homestead entry for the E. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 31, T. 5 S., R. 17 W., Little Rock, Arkansas.

On September 5, 1883, the relinquishment of said entry was filed and at the same time Wiley B. Davis made homestead entry of the tract. By letter of your office, dated October 18, 1883, Thomas Cathran was allowed to place of record his declaratory statement, alleging settlement December 1, 1878, for the above described E. $\frac{1}{2}$ and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$. On September 24th preceding Cathran had filed affidavit of contest against the entry of Davis alleging abandonment. By agreement hearing was set for January 25, 1884.

The local officers decided that the entry should be canceled. The testimony shows that Cathran settled on the tract, with his family, in 1879, and continued to reside thereon until date of hearing; that his improvements consist of a dwelling, smoke house, crib, stable, garden, orchard and eight acres cleared; that Boyce settled on the tract in dispute about April 17, 1881, built two houses, fenced and broke about one acre, made some other slight improvements, and resided on the land until April 1, 1883, and about the 5th of September following sold his improvements to Davis. On the last mentioned day, as stated, Davis made entry and took up his residence on the land.

The charge of abandonment was not sustained by the proof, and the entry of Davis will not be disturbed by reason of said charge. Your office, by letter of January 28, 1885, after finding the facts substantially as above stated, said: "The testimony shows that at the time of the relinquishment of Boyce and the restoration of the tract to entry, Cathran was actually residing upon the tract as his home, cultivating and improving the same as he had been doing since 1878, and that Davis made his entry with a full knowledge of these facts. Under the rulings of this Department, when a party is owning improvements and is residing upon land covered by a homestead entry at the date of the cancellation thereof, he is considered as being a settler, and no specific act is necessary to constitute a new settlement, and by reason of being upon the land at the instant of cancellation his settlement right is held to be prior to that of a person making a homestead entry after the cancellation has been noted in the local office. (See *Peterson v. Kitchen* (2 C. L. O., 181); *Porter v. Johnson* (3 C. L. O., 37); *Kasten v. Benz* (1 Lester, 418). I am of opinion that Cathran being the prior settler is entitled to enter the tract upon making his final proof." The entry was then held for cancellation.

Without discussing in detail the cases cited in support of the conclusion of your office, it is sufficient to say that they do not present facts similar to those in the case at bar.

Section 2265 of the Revised Statutes provides that a pre-emption claimant on unoffered land shall file his declaratory statement within three months from the time of settlement; "otherwise his claim shall be forfeited, and the tract awarded to the next settler in order of time on the same tract of land who has given such notice and otherwise complied with the conditions of the law."

It is clear that Cathran failed to file his declaratory statement during the time fixed by law. When he did file it Davis was living on the land, clearing it under his homestead entry, and in every particular, as far as the record discloses, complying with law. Under Section 2265 of the Revised Statutes, therefore, the right of Cathran was forfeited in favor of Davis.

Said decision is accordingly reversed and the contest dismissed. I do not find it necessary to further determine the rights of the parties hereto.

PRACTICE—SPECIFICATION OF ERRORS—APPEAL.

STEPHEN SIMON.

The notice of appeal and specification of errors may be filed at different dates, if each is filed within the time prescribed therefor.

The sufficiency of an appeal from the General Land Office is left for the final determination of the Department.

Secretary Lamar to Commissioner Sparks, November 18, 1886.

On the 10th instant you transmitted the application of Stephen Simon for an order directing you to certify to this Department the record of proceedings in your office relative to the rejection of his application for the cancellation of his homestead entry No. 8022, SE. $\frac{1}{4}$ of Sec. 26, T. 120 N., R. 74 W., with the privilege of entering the NW. $\frac{1}{4}$ of Sec. 20, T. 120 N., R. 75 W., at the Huron land district, Dakota Territory. With said application are forwarded copies of your office decisions of February 16, May 15, and September 21, 1886, showing the action of your office in said case.

It appears from the application and the decisions above referred to that your office, on February 16, 1886, directed the register and receiver of said land office to advise said Simon, "whose application for the cancellation of his homestead entry No. 8022, SE. $\frac{1}{4}$ of Sec. 26, T. 120, R. 74, without prejudice, you transmitted January 29, 1886, that his request will not be further considered, unless he submit in connection therewith an application to enter some specific tract under the same law, as required by departmental ruling of January 8, 1886. See 4 L. D., 310, case of Fremont S. Graham."

On May 15, 1886, your office again advised the local land officers that said Simon's application to have his said entry canceled, with the privilege of entering the NW. $\frac{1}{4}$ of Sec. 20, T. 120 N., R. 75 W., must be refused, because the application was not made until after the expiration of more than a year and a half after the date of said entry, and for the further reason that the explanation of the manner in which the alleged error in making said entry occurred was not satisfactory.

On August 20, 1886, the local land officers transmitted the appeal of said Simon from said decision of May 15, 1886, refusing to cancel his

said entry without prejudice. On September 21, 1886, your office again advised the local land officers that Simon's appeal "fails to designate clearly and concisely the errors complained of, merely stating that the Honorable Commissioner erred in refusing to grant the petition for the cancellation of said entry without prejudice. The right of appeal is considered waived; (see *Stevens v. Robinson*, 4 L. D., 551, re-affirmed August 31, 1886), and the case closed."

The argument filed with said appeal alleges that the affidavit, filed in support of Simon's application, shows that the tract of land embraced in said entry is not the tract that the claimant sought to enter, and that it is not the tract that he supposed that he had entered; that it is shown by affidavits that the tract of land embraced in said entry is not fit for agricultural purposes and cannot be used for that purpose; that the claimant is a *bona fide* settler and is seeking for a home on the government lands, to the end that he may have a farm of his own to cultivate, and a home for his family, and that he is acting in the utmost good faith.

Rule of Practice No. 81 (4 L. D., 46) provides that "An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims;" and Rule 82 (*ibid.*) provides that, "When the Commissioner considers an appeal defective he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice, the appeal may be dismissed by the Secretary of the Interior and the case closed." Rule 88 provides that, "within the time allowed for giving notice of appeal, the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains;" and Rule 90 provides that "failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be closed."

It is clear that under the rules of practice the notice of appeal and the specification of errors may be filed at different dates, if each is filed within the time prescribed. If the appeal be defective, then the appellant is entitled to notice of the defect, and allowed time to perfect the same. If the defect is not supplied, then the appeal may be dismissed—not by your office, but by the Secretary of the Interior."

In the case of *Pedersen v. Johannessen* (4 L. D., 343) this Department decided, on January 25th last, that "Under the rule, as it formerly read, the appeal could be dismissed by the Commissioner; but the rule was changed in the interest of parties appealing, in order that the Department might have an opportunity of passing upon the question whether the Commissioner was correct in his decision as to what constituted a defect in the appeal." In the case of *Stevens v. Robinson* (*ibid.*, 551), decided June 5, 1886, cited by your office, the specification of errors was not filed until after the expiration of the time allowed by the Rules of

Practice, and counsel for contestee filed a motion for the dismissal of the appeal, on the ground that the specification of errors was not filed in time, and this Department decided, upon the authority of *Pedersen v. Johannessen, supra*, that the appeal was fatally defective and that, even if your office should overlook the requirements of Rule 90 (*supra*), relative to the filing of a specification of errors, yet the rule is none the less imperative upon this Department, "at least in the presence of a motion to dismiss by the adverse party."

In the case of the Saint Paul, Minneapolis and Manitoba Railway Company *v. Vannest* (5 L. D., 205), decided October 30, 1880, this Department held that "your office may refuse to receive and file an appeal when the same is not presented within the time prescribed by the Rules of Practice, but after the appeal has been filed and no objection made thereto, then the appeal can only be dismissed by this Department."

In the present case, it appears that the appeal was filed in time, with a specification of errors; and under the decision in the case of *Pedersen v. Johannessen (supra)* the claimant has the right to demand the judgment of this Department upon the sufficiency of his application, as well as the completeness of his appeal. You will therefore certify the papers in said case to this Department, and in the meantime suspend action until further advised.

PRACTICE—NOTICE OF HEARING.

UNITED STATES *v.* RICHARDSON.

Though actual notice to the entryman and his transferee appears of record it will not confer jurisdiction in the absence of legal service thereof.

Secretary Lamar to Commissioner Sparks, November 24, 1886.

This record presents the appeal of Walter B. Richardson from the decision of your office, dated February 10, 1885, holding for cancellation his pre-emption cash entry No. 7414 of Lot 10 and E. $\frac{1}{2}$ of Lot 9 and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 2, T. 22 N., R. 14 W., made November 27, 1880, at the San Francisco land office, in the State of California.

It is shown that on May 26, 1884, a special agent of your office, referring to your office letter, dated April 28th preceding—copy of which does not appear in the record—reported that on January 16, 1881, he made an examination of the land covered by said entry, and was unable to find any improvements whatever thereon, or any sign of occupation; that he was informed by one Scott Burns, who resides within a mile of the land, that he built a board cabin in a ravine, which was overlooked by said special agent; that he was also informed that said Richardson was a minor when he made his filing, and that he made final proof within six months after he became of age; that "as there is no question but the filing was absolutely void, all subsequent proceed-

ings thereunder must be of the same character, even if there had been a strict compliance with the law as to residence and cultivation, which there has not."

Thereupon, your office, on July 9, 1884, suspended said entry, and ordered a hearing to determine the validity of the same. Notice was issued on August 8, 1884, fixing September 26, 1884, for the hearing before the local land officers. The notice was posted in said land office, as appears by the certificate of the register, and a copy of the same was sent by registered letter addressed to said Richardson, at Covelo, in said State, and was delivered to him September 13, only thirteen days prior to the date fixed for said hearing. The entryman made default, and the special agent testified in behalf of the government to the statements made in his said report. On October 13, 1884, the local land officers found that the service of notice was insufficient, because the registered letter was not delivered to the entryman thirty days prior to the day fixed for the hearing, and they declined to consider the testimony, and decided that the case should remain as it was before a day was set for the hearing. On September 29, 1884, said agent again reported to your office—referring to a letter which appears in the record from J. P. Thomson—stating that said letter was delivered to Richardson on September 13, 1884; that Richardson sold to Montague, and Montague to Thomson; that he (Thomson) would have to defend the case himself, as Richardson had left the State and that H. W. Mathews would appear for him; that he (the agent) had no doubt that the entryman was informed of the character of the registered letter giving notice of the hearing, and that nothing more could be done in the matter, as the agent was required to close up all the matters which he had in hand prior to October 1st. Your office on February 10, 1885, considered the case, and held that the manner of service was sufficient; that since the purchaser had notice of the hearing and had signified his intention of defending the case, as the claimant had expressed his unwillingness to do, and the purchaser had failed to attend at said hearing, the notice was found sufficient, and the entry was held for cancellation.

The material question for consideration is, was the service of notice of said hearing sufficient? It is clear that personal service must be made in all cases when possible; (Rule of Practice No. 9, 5 L. D. 38), and that a party is entitled to at least thirty days' notice of the hearing, "unless by written consent an earlier day shall be agreed upon." (Rule 7, *ibid.*, 37).

In the case of *Crowston v. Seal* (5 L. D., 213), this Department held that where a party acknowledges by registered letter the receipt of notice of contest, thirty days prior to the day fixed for hearing, it is personal service under Rule of Practice No. 15 (*ibidem*, 38), which provides: "Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the persons who served the notice attached thereto, stating the time, place, and manner of service."

In the same decision it was stated "that actual in the absence of legal notice does not put the opposite party on his defense;" citing *Parker v. Castle* (4 L. D., 84); *Milne v. Dowling* (ibid., 378); *Miller v. Knutsen* (ibidem, 536).

In the case of the *United States v. Copeland, et al.*, (5 L. D., 170), the Department held that where the special agent's report, on which the cancellation was based, discloses a transfer of the land after the issuance of final certificate, such transferee should receive notice of the cancellation. In the case at bar, the notice was not received by the entryman thirty days prior to the day fixed for the hearing, and the special agent's report discloses the name of the transferee. Under the rules of practice and the decisions cited (*supra*), the decision of the local officers was correct and should be affirmed. For the foregoing reasons, said decision of your office must be modified, and the case will be returned to the local land officers with directions to them to issue an alias notice to the entryman and to give notice to the transferee in accordance with the rules of practice.

MINING CLAIM—PROTEST—CERTIORARI.

A. M. HOLTER LODE.

A petition for certiorari should be under oath, setting forth specifically the decision complained of, and wherein the same is irregular, or in what manner the applicant is injured thereby.

Secretary Lamar to Commissioner Sparks, November 24, 1886.

Referring to mineral entry No. 1099, Helena, Montana, made by the Elkhorn Mining Company upon the A. M. Holter Lode, I have before me an informal application for certiorari on behalf of "H. Fred. Bright *et al.*" It appears therefrom that your office having before it the said mineral entry and the protest of this applicant, decided that said protest was not sufficient to warrant favorable action thereon. That on the attempt of said protestants to appeal, your office held that the right of appeal did not extend to protestants, whereupon this application was made; it being further alleged therein that said protest charges fraud in the matter of said entry, that an adverse suit is now pending in which such matter is at issue, and that your office refused to entertain the protest, because an adverse claim was not filed within the proper time.

The application is fatally defective in three particulars. (1) It is not under oath; (2) it does not set forth specifically the decision complained of; and (3) it is not shown wherein the said decision was irregular or in what manner the applicant is injured thereby.

By inspection of the record of this case in your office, it appears that said protest was given full consideration, and as a review of such action is not warranted by this application, it is accordingly denied, and transmitted herewith.

REVIEW DENIED.

Motion for review of departmental decision in *James v. Hall et al.* (4 L. D. 552) overruled by Acting Secretary Hawkins, November 27, 1886.

MINERAL PATENT—TOWNSITE CLAUSE.

The insertion in a mineral patent of a clause reserving townsite rights is not authorized by law.

Acting Secretary Hawkins to Commissioner Sparks, November 27, 1886.

I am in receipt of your communication of October 25, 1886, asking instructions relative to the insertion of the townsite clause in lode patents, and whether the application of the decision in *Papina v. Alderson et al.* (1 B. L. P., 91) in adjudicating cases in your office is to be continued, or whether the future practice shall be governed by the principles established in *Deffeback v. Hawke* (115 U. S., 392).

The clause referred to is as follows:

"Excepting and excluding however from these presents all town property rights upon the surface, and there are hereby expressly excepted and excluded from the same all houses, buildings, structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above described premises, not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession and enjoyment of the same."

It has not been the practice of the Land Department to insert this clause in patents for placer claims, for the reason that the surface is absolutely required for the full enjoyment of the land, by either the placer or townsite owners. *Kemp v. Starr* (5 C. L. O., 130); *Townsite of Deadwood* (8 C. L. O., 153). But the Department has for many years recognized the principle that there may be a division of the fee simple in the surface and the minerals underneath the surface, and upon this principle the clause referred to was inserted in lode claims. *Turner v. Lang* (1 C. L. O., 51); *Central City, Colorado* (2 C. L. O., 150); *Rico Townsite* (1 L. D. 567). This rule was recognized in the case of *Papina v. Alderson* (*supra*), to which you refer, although it was not directly in issue in that case.

While the case of *Deffeback v. Hawke* involved the question of the rights of claimants under patents for placer claims, it also clearly decided the principle that as under the act of May 10, 1872, all valuable mineral deposits in lands belonging to the United States, whether surveyed or unsurveyed, are free and open to exploration and purchase, and the lands on which they are found to occupation and purchase, that the fee is indivisible, and that either the mining claimant or the townsite occupants is entitled to it to the exclusion of the other. The

act of May 10, 1872, upon which this decision rests provides (Sec. 2322 R. S.) that—

“The locaters of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, where no adverse claim exists on the 10 of May, 1872, so long as they comply with the laws of the United States and with State, Territorial and local regulations, not in conflict with the laws of the United States governing their possessory title, shall have the *exclusive right of possession and enjoyment of all the surface included within the lines of their location*, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations.”

The reasoning of the court in the case of *Deffeback v. Hawke* is general in its application to all mineral claims, whether lode or placer. In holding that the officers of the land department have no authority to insert in a patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed; and that patent of a placer claim carries with it the title to the surface as well as the land beneath; it is for the reason that “the act of Congress of May 10, 1872, contemplates the purchase of the land on which valuable mineral deposits are found, and its provisions in this respect are retained in Revised Statutes, Section 2319.” This section of the Revised Statutes refers to all mineral lands, whether lode or placer. If a mining location is made before townsite *appropriation*, it excepts the land absolutely, and hence the clause of reservation in the patent to which you refer could not affect the title thereby conveyed.

I therefore recommend that this clause should not be inserted in patents for any mining claim, and that the practice of your office in this respect shall be governed by the construction given to the act of May 10, 1872, by the court in the case of *Deffeback v. Hawke*.

RE-HEARING DENIED.

GEER v. FARRINGTON.

Application for re-hearing in the above case (4 L. D. 410) denied by Acting Secretary Hawkins, November 27, 1886.

ENTRY PAPERS—FILES OF THE GENERAL LAND OFFICE.

PUGET MILL CO.

Papers pertaining to entries and forming the basis thereof belong to the permanent files of the General Land Office and may not be returned to the parties filing the same.

Commissioner Sparks to the register and receiver, Olympia, Washington Territory, June 16, 1885.

I am in receipt of your letters (7) of 1st instant, enclosing petitions of the Puget Mill Company, per their agent, in reference to soldiers additional homestead entries, finals 561, 570, 871, 560, 577, 580, and 575, canceled, or held for cancellation for illegality, and for the lands of which said company have made cash entries under the act of June 15, 1880. The petitions represent that said company own the lands in question as assignee of the entrymen, that they have been compelled to secure their title from the government by cash entries under the act of June 15, 1880, and ask that the papers upon which said additional homestead entries are based be returned to you for delivery to said company, and in reply have to state that all papers pertaining to said entries and forming the basis thereof are portions of the permanent files of this office and can not be returned in the manner petitioned for.

If said papers are necessary as evidence in any action in the local courts, they will be forwarded to your care and you will respond to such legal *subpœna duces tecum* as may be served upon you regarding the same.

NOTE.—This decision was affirmed by Acting Secretary Hawkins, November 29, 1886.

HYPOTHETICAL CASES BEFORE THE DEPARTMENT.

F. GREENE.

As the Secretary of the Interior must determine all cases coming before the Department on appeal, it would not be proper for him to express an opinion as to whether the proposed action of the settlers would be in violation of the law.

Acting Secretary Hawkins to Mr. F. Greene, Mandan, Dakota, November 29, 1886.

Your letter of the 23rd instant, desiring to obtain my "opinion in regard to the matter of settlers on government land abandoning their claims temporarily for the winter, in order to earn a livelihood," came duly to hand. You add, doubtless as a reason for making this request, that "owing to the almost complete failure of crops in this section the past season, a large proportion of the people will be unable to main-

tain themselves and families through the winter," and close by requesting permission to publish my reply to your letter.

It would be improper for this Department to express any "opinion," or make any suggestions in regard to the question concerning which you write, other than as required in cases coming before it from the General Land Office, as it could have but a limited knowledge at best of the circumstances surrounding the cases to be affected. The same law which governs the Department in its supervision of all matters pertaining to the public lands controls the settlers upon such lands, determines their rights, liabilities and privileges, and must be the rule to guide them in all their actions in connection therewith.

The fact that the Secretary of the Interior in cases coming before him on appeal is the final judge in the Department of the acts and good faith of settlers seeking to acquire title to the public lands under the laws of Congress, affords another reason why he should not give any opinion such as you desire. In the regular course of the business of the Department the case of the man who would be influenced or controlled by such an opinion, might come before him for decision and final determination.

All I can do in answer to your letter is to refer you to the decisions of the Department rendered and published from time to time, in which the principle involved in the request you make may be directly or indirectly passed upon.

HOMESTEAD CONTEST—QUALIFICATION OF CONTESTANT.

LERNE v. MARTIN.

An alien may contest a homestead entry and secure a preferred right of entry thereby if, after the resulting cancellation, he is qualified to enter.

Secretary Lamar to Commissioner Sparks, November 2, 1886.

I have considered the case of Elery Lerne v. George W. Martin, as presented by the appeal of the latter from the decision of your office, dated May 28, 1885, holding for cancellation his homestead entry No. 7944 of the SW. $\frac{1}{4}$ of Sec. 10, T. 25 N., R. 3 W., made March 22, 1882, at the Neligh land office, in the State of Nebraska, also the appeal from the decision of your office, dated July 7, 1885, denying his application for a rehearing.

The record shows that Lerne initiated contest against said entry on May 27, 1884, and hearing was duly had on July 16, same year. Both parties appeared at the hearing. Upon the evidence submitted the local land officers decided in favor of the contestant. On appeal, your office found that the entryman did not establish and maintain a residence on said tract in good faith as required by law, and affirmed the decision of the local land officers, from which decision the claimant duly

appealed. Subsequently, the entryman made application to the local land officers for a rehearing, upon the ground that the contestant at the time of the initiation of the contest was an alien, and therefore disqualified to make said contest. The local land officers rejected said application, and your office, on appeal, affirmed their decision.

It has been repeatedly ruled by this Department that any person can contest a homestead entry, and if after the entry is canceled as the result of the contest, the contestant is duly qualified, he may be allowed to enter the land. *Shinnes v. Bates* (4 L. D., 203); *Lyman v. Fayant et al.* (ibid., 424). There was, therefore, no error in refusing the application for a rehearing.

A careful examination of the whole record shows no reason for disturbing said decisions and the same are hereby affirmed.

PRACTICE—FINAL PROOF—PROTEST.

RUE v. FARIBAULT ET AL.

A protestant, who sets up his filing and settlement claim thereunder to defeat the final proof of another, must submit to a judgment of cancellation, if his protest fails, though he has not yet offered his own final proof.

Acting Secretary Hawkins to Commissioner Sparks, November 30, 1886.

I have considered the case of John Rue v. George H. Faribault and Daniel Cavence, involving the SW. $\frac{1}{4}$ of Sec. 17, T. 153 N., R. 64 W., Devil's Lake, Dakota, on appeal by the first named from your decision of June 18, 1885, adverse to him.

It appears from the record that Rue filed pre-emption declaratory statement for the tract described September 29, 1883, with allegation of settlement April 5, 1883. On the same day (September 29, 1883, which seems to be the day when the township plat was filed), Faribault made homestead entry for the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said section 17. On the same day Cavence filed pre-emption declaratory statement for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said section 17, alleging settlement May 7, 1883.

After the usual notice, both Faribault and Cavence appeared on January 4, 1884, to make final proof, with a view to the purchase of the lands embraced in their respective claims. They were met by Rue, who appeared as a protestant against their claims, on the ground of conflict with his claim as embraced by his pre-emption declaratory statement.

It will be observed that each of the applications to purchase includes one-half of the tract claimed by Rue, the W. $\frac{1}{2}$ thereof being embraced in Faribault's claim and the E. $\frac{1}{2}$ in the claim of Cavence.

As a result of Rue's protest, hearing was set for January 24, 1884, in the case of Faribault and January 25, 1884, in the case of Cavence.

At the close of the hearing in Faribault's case it was agreed by all parties to submit both cases upon the testimony taken in the case against Faribault. On the testimony submitted, together with the final proof made by Faribault and Cavence respectively, on January 4, 1884, the day advertised for said proof, the local office held that Rue's protest was without good grounds, for the reason that his residence on his claim had not been of such a character as to justify an award to him, and further held that the proof submitted by Faribault and Cavence respectively should be approved. On appeal, you sustained this finding, and held Rue's filing for cancellation; and now comes Rue by counsel and appeals from your said decision.

* * * * *

Objection is made to the consideration at this time of the *bona fides* of Rue, or to an examination of the question as to his compliance with the law under which he claims to have settled, it being argued that those are questions for determination when he shall apply to make final proof. This objection is without force, since the question as to priority of residence was by the protest made one of the main points in issue, the first allegation in said protest being that Rue was the first bona-fide settler.

Among the papers in the case are motions filed by Faribault and Cavence respectively to have Rue's pre-emption declaratory statement canceled from the records, and this contest closed, for the reason that said declaratory statement has expired by limitation, no proof having been submitted by him, and the legal period for submitting his final proof having expired.

Having examined the case on the record made at the hearing, and having reached a conclusion, the effect of which is the cancellation of Rue's filing and the acceptance of the proofs of Faribault and Cavence, it is unnecessary to consider these motions. Your decision is affirmed

TIMBER CULTURE ENTRY—DEVOID OF TIMBER.

ALLEN *v.* COOLEY.

An entry should not be canceled where it was allowed in accordance with departmental rulings then in force, and the entryman relying thereon has proceeded in compliance with the law.

Acting Secretary Hawkins to Commissioner Sparks, November 30, 1886.

I have considered the case of William Allen *v.* James T. Cooley, as presented by the appeal of the former from the decision of your office, dated January 28, 1885, affirming the decision of the local land officers dismissing Allen's contest against the timber culture entry No. 3019 of

the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 13 S., R. 4 W., made by said Cooley on April 30, 1881, at the Salina land office, Kansas.

The facts are substantially set forth in the decision appealed from. The only material question involved is, whether said section was "devoid of timber" within the meaning of the act of Congress approved June 14, 1878 (20 Stat., 113).

Your office held that under the departmental decisions of *Blenkner v. Sloggy* (2 L. D., 267), and *Box v. Ulstein* (3 L. D., 143), that said tract was subject to entry under said act. To the same effect is the departmental decision in the case of *Bartch v. Kennedy* (3 L. D., 437), decided on March 3, 1885, by Secretary Teller, and the motion for review, "based upon the assumption of error in the construction of the law of the case," overruled by Acting Secretary Muldrow, on March 20, 1885. Since said entry was allowed by the local land officers in accordance with the construction of the timber culture law by the Department then in force, and upon the faith of such entry the claimant has proceeded to comply with the law, I do not think it in harmony with the principles of justice to deprive him of the fruits of his labor.

The decision appealed from is accordingly affirmed.

HOMESTEAD CONTEST—PRACTICE.

SMITH *v.* GREEN ET AL.

A contest resting on the charge of abandonment, sale, and relinquishment is not premature though brought within less than six months after entry.

The failure to file a motion in time is not cured by notice thereof served within the proper period.

Secretary Lamar to Commissioner Sparks, December 3, 1886.

This controversy involves the NW. $\frac{1}{4}$ of Sec. 29, T. 106 N., R. 63 W., Mitchell, Dakota Territory, the material facts in the case being as follows: June 27, 1883, Ida Green made homestead entry No. 25,506 of the tract specified, and on September 3d following Calvin M. Young initiated contest against said entry charging that "claimant has entirely abandoned, sold and relinquished said land for a consideration." Hearing was had and testimony submitted November 13 ensuing, claimant failing to appear.

October 22, 1884, the local office dismissed this contest on the ground that it was prematurely brought, citing as authority for such action the case of *Bailey v. Olson* (2 L. D., 40). Two days thereafter (October 24, 1884), Jessie B. Smith applied to contest the aforesaid entry on the general charge of abandonment. This application was rejected by the local office on the ground that "prior contestant has right of appeal for thirty days from October 22, 1884."

November 13, 1884, Young filed a second contest, which was allowed, notice issued, and hearing was set for December 27, 1884.

December 1, 1884, Smith by her attorneys filed a motion to dismiss the second contest of Young and have her own contest reinstated. This motion was granted by the local office on December 2, 1884, and the contest of Young was thereupon dismissed. From this action Young, December 27, 1884, appealed to your office, at the same time submitting testimony against Green's entry, which testimony, however, was not passed upon by the local office, because Young's contest had been dismissed as aforesaid. Upon consideration of the case as then presented your office on the 23d of April, 1885, rendered the decision from which the appeal here was taken, reversed the action of the local office in dismissing Young's second contest, and in turn dismissed the contest of Smith, because she had failed to appeal from the dismissal of her contest October 24, 1884, as aforesaid.

May 11, 1885, the relinquishment of Green's entry was filed in the local office, and at the same time Young made homestead entry No. 27,436 of the tract in question. The appeal of Smith was transmitted by register's letter of July 17, 1885, and has been given careful consideration.

Recurring to the early proceedings in this case, it is observed that the Mitchell office erred in dismissing Young's first contest. The case of *Bailey v. Olson*, cited in support of such action, is not applicable. See cases of *Lilly v. Thom* (4 L. D., 245); *Pickett v. Engle* (id., 522); and *James v. Hall et al.* (id., 553); but inasmuch as no appeal was taken from such dismissal, and a new contest was commenced, Young thereby lost whatever rights he might have acquired by virtue of his first contest. *Churchill v. Seeley* (4 L. D., 589). Again, the dismissal of Smith's application to contest on October 24, 1884, was erroneous. This contest should have been held to await the final result of Young's first contest. See the case last cited. But inasmuch as Smith failed to appeal from the dismissal of her contest within the thirty days required by the rules of practice, she therefore lost whatever rights she might have acquired by virtue of her contest. True, she filed a motion to dismiss Young's contest more than thirty days after the dismissal of her contest, having given Young notice that such motion would be filed. But that was of no avail, and the dismissal of Young's second contest on the 2d of December, 1884, was another error on the part of the local office. Young's second contest should have been sustained and your office properly ruled on that question.

The relinquishment of Green having been since filed, and Young's entry of the tract allowed, such entry should remain intact, and I so direct. The judgment of your office on the material questions involved is affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD.

MARY C. STEPHENSON.

The certificate of right to make additional entry issued to the widow of a deceased soldier may properly contain a clause requiring her to show, at the time of applying to make entry, that she has not remarried.

Commissioner Sparks to Mr. A. A. Hosmer, Washington, D. C., October 19, 1885.

In reply to your letter of the 14th instant, in reference to the additional homestead right of Mary C. Stephenson, widow of Alex. C. Stephenson, I have to state that Mrs. Stephenson claims, under sections 2306 and 2307, United States Revised Statutes, providing for homesteads on the public lands, approved June 22, 1874. Section 2306 provides, in favor of the class of ex-soldiers described in the previous section, 2304, that "every person entitled under the provisions of section 2304 to enter a homestead who may have heretofore entered under the homestead law a quantity of land less than 160 acres shall be permitted to enter so much land as when added to the quantity previously entered shall not exceed 160 acres." Section 2307 provides that "in case of the death of any person who would be entitled to a homestead under the provisions of section 2304, his widow if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvement therein contained."

Soon after entering upon my duties, as Commissioner, a paper was presented to me, for my signature, certifying that Mrs. Stephenson was entitled to make an additional entry, as the widow of Alexander C. Stephenson, under said sections 2306 and 2307. I added to this certificate, before signing it, a proviso that she should prove, at the time of applying to make entry, that she was still the widow of A. C. Stephenson. You now insist that this proviso should be eliminated from my certificate. I decline to eliminate it therefrom. I understand that certificates of this character have been issued by my predecessors without such a condition being inserted therein, but I do not take the same view of my duty under the laws, and must decline to follow the precedents set by them.

Any one can see by a glance at the statutes referred to, that Mrs. Stephenson's right to additional entry depends upon her continuing to be the widow of A. C. Stephenson; that if she has since remarried, or died, the right belongs to minor orphan children, if any, or ceases altogether, as a claim against the United States.

Is there anything unreasonable, then, in requiring that this essential fact should be proved, when application is made to exercise the right

dependent thereon? The law does not make it incumbent on me to certify to Mrs. Stephenson's right at all. I am not willing to certify to it without adding the requirement to which you object. There is no intention to discriminate against Mrs. Stephenson in this case. I regard all cases of the kind as properly subject to the same rule. I am not aware that any certificate has been issued in disregard thereof, since my attention was called to the point, in the Stephenson case, and if any has been, it has resulted from inadvertence.

NOTE—The foregoing decision was affirmed by Secretary Lamar, December 3, 1886.

CIRCULAR

RELATING TO

MANNER OF ACQUIRING TITLE TO TOWN-SITES ON PUBLIC LANDS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., July 9, 1886.**

REGISTERS AND RECEIVERS,

United States Land Offices:

GENTLEMEN: There are three methods by which title may be acquired to public lands for town-site purposes: one provided for in sections 2380 and 2381; another in sections 2382, 2383, 2384, 2385, and 2386; and the third in sections 2387, 2388, and 2389, United States Revised Statutes.

I.

Section 2380 authorizes the President to reserve public lands for town-sites purposes on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population. Section 2381 provides for the survey of such reservation into urban or suburban lots, the appraisalment of the same, and the sale thereof at public outcry; the lots remaining unsold are thereafter to be disposed of at public sale or private entry, at not less than the appraised value thereof.

II.

Sections 2382, 2383, 2384, 2385, and 2386, Revised Statutes (act 3d March, 1863, 12 Stat., 754; act 3d March, 1865, 13 Stat., 530), limit the extent of the area of the city or town which may be entered under said acts to 640 acres, to be laid off in lots, which, after filing in this office

* The circular takes effect on the date of the Secretary's approval.

the statement, transcripts, and testimony required by section 2383, are to be offered at public sale to the highest bidder at a minimum of \$10 for each lot.

An actual settler upon any one lot may pre-empt that lot, and any additional lot on which he may have substantial improvements, at said minimum at any time before the day of sale. Such person must furnish pre-emption proof showing residence and improvement upon the original lot and improvement upon additional lot, after the usual notice of intention by publication.

Lots not disposed of at time of public sale are thereafter subject to private entry at such minimum or at such reasonable price as the Secretary of the Interior may order from time to time, after at least three months' notice, as the municipal property may increase or decrease in value.

The preliminaries required by this method are:

1. Parties having founded or who desire to found a city or town on the public lands, under the provisions of sections 2382, 2383, 2384, 2385, and 2386, must file with the recorder of the county in which the land is situate a plat thereof, describing the exterior boundaries of the land according to the lines of public surveys, where such surveys have been made.

2. Such plat must state the name of the city or town, exhibit the streets, squares, blocks, lots, and alleys, and specify the size of the same, with measurements and area of each municipal subdivision, the lots in which shall not exceed 4,200 square feet, with a statement of the extent and general character of the improvements.

3. The plat and statement must be verified by the oath of the party acting for and in behalf of the occupants and inhabitants of the town or city.

4. Within one month after filing the plat with the recorder of the county a verified copy of said plat and statement must be sent to the General Land Office, accompanied by the testimony of two witnesses that such town or city has been established in good faith.

5. Where the city or town is within the limits of an organized land district a similar map and statement must be filed with the register and receiver. The exterior boundary lines of the town, if upon the land over which Government surveys have not been extended, may, when such surveys are so extended, be adjusted according to those lines, where it can be done without impairing vested rights.

6. In case the parties interested shall fail or refuse, within twelve months after founding a city or town, to file in the General Land Office a transcript map, with the statement and testimony called for by section 2382, the Secretary of the Interior may cause a survey and plat to be made of said city or town, and thereafter the lots will be sold at an increase of 50 per cent. on the minimum price of \$10 per lot.

7. When lots vary in size from the limitation fixed in section 2382 (4,200 square feet), and the lots, buildings, and improvements cover an area greater than 640 acres, such variance as to size of lots or excess in area will prove no bar to entry, but the price of the lots may be increased to such reasonable amount as the Secretary may by rule establish.

8. Title to be acquired to town lots embracing mineral entries is subject to recognized possession and necessary use for mining purposes, as provided in section 2386.

III.

Lands actually settled upon and occupied as a town-site, and therefore not subject to entry under the agricultural pre-emption laws, may be entered as a town-site, in accordance with the provisions of sections 2337, 2388, and 2389, United States Revised Statutes. (Act March 2, 1867, 14 Stat., 541; act March 3, 1877, 19 Stat., 392.)

1. If the town is incorporated, the entry may be made by the corporate authorities thereof through the mayor or other principal officer duly authorized so to do.

2. If the town is not incorporated, the entry may be made by the judge of the county court for the county in which said town is situated.

3. In either case the entry must be made in trust for the use and benefit of the occupants thereof, according to their respective interests.

4. The execution of such trust as to the disposal of lots and the proceeds of sales is to be conducted under regulations prescribed by state or territorial laws. Acts of trustees not in accordance with such regulations are void.

5. Private individuals or organizations are not authorized to enter town-sites under this act, nor can entries under this act be made of prospective town-sites. The town must be actually established, and the entry must be for the benefit of the actual inhabitants and occupants thereof.

6. The officer authorized to enter a town-site may make entry at once, or he may initiate an entry by filing a declaratory statement of the purpose of the inhabitants to make a town-site entry of the land described.

7. The entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States, and, if upon surveyed lands, its exterior limits must conform to the legal subdivisions of the public lands.

8. The amount of land that may be entered under this act is proportionate to the number of inhabitants. One hundred and less than two hundred inhabitants may enter not to exceed 320 acres; two hundred and less than one thousand inhabitants may enter not to exceed 640 acres; and where the inhabitants number one thousand and over an amount not to exceed 1,280 acres may be entered; and for each addi-

tional one thousand inhabitants, not to exceed five thousand in all, a further amount of 320 acres may be allowed.

9. When the number of inhabitants of a town is less than one hundred the town-site shall be restricted to the land actually occupied for town purposes, by legal subdivisions.

10. Where an entry is made of less than the maximum quantity of land allowed for town-site purposes, additional entries may be made of contiguous tracts occupied for town purposes, which, when added to the previous entry or entries, will not exceed 2,560 acres; but no additional entry can be allowed which will make the total area exceed the area to which the town may be entitled by virtue of its population at date of additional entry.

11. The land must be paid for at the Government price per acre, and proof must be furnished relating—

1st, To municipal occupation of the land;

2d, Number of inhabitants;

3d, Extent and value of town improvements;

4th, Date when land was first used for town-site purposes;

5th, Official character and authority of officer making entry; and

6th, If an incorporated town, proof of incorporation, which should be a certified copy of the act of incorporation.

12. Thirty days' publication of notice of intention to make proof must be made and proof of publication furnished.

13. Title cannot be acquired under this act to mines of gold, silver, cinnabar, or copper, nor to any valid mining claim or possession. A non-mineral affidavit is required in all states and territories except Florida, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, and Wisconsin.

14. A greater quantity of land than 2,560 acres is not excluded from pre-emption or homestead entry because of town-site reservations unless the excess in area is actually settled upon, inhabited, improved, and used for business and municipal purposes.

15. If the corporate limits of a town are in excess of the maximum area authorized to be entered as a town-site, the proper quantity may be set off, as provided in section 3 of the act of March 3, 1877, and the residue be open to disposal under the homestead and pre-emption laws.

Very respectfully,

WM. A. J. SPARKS,
Commissioner.

Approved:

L. Q. C. LAMAR,

Secretary.

NOVEMBER 5, 1886.

RESTORATION OF FORFEITED RAILROAD LANDS.

ATLANTIC & PAC. R. R. Co.

The lands within the Territory of New Mexico, formerly granted to this company, but declared forfeited and restored to the public domain by the act of July 6, 1886, are opened to entry and settlement, and the price of such lands as well as the even numbered sections is fixed at \$2.50 per acre.

The price of the alternate ungranted sections, having been increased by statute, cannot be reduced on the forfeiture of the grant, in the absence of express authority.

The odd numbered sections forfeited by said act within the conflicting limits of this road and the Southern Pacific, are withheld from entry pending an equitable settlement of the rights of the latter company.

Secretary Lamar to Commissioner Sparks, December 10, 1886.

Your letter of November 12, 1886, in relation to the restoration to the public domain and fixing the price of the forfeited lands heretofore granted to the Atlantic and Pacific Railroad Company, has been received, and the suggestions and recommendations therein made duly considered.

The act of July 6, 1886, (Chap. 637, pamphlet copy, p. 123) provides that all the lands, with certain exceptions named, theretofore granted to the Atlantic and Pacific Railroad Company, "which are adjacent to and coterminous with the uncompleted portions of the main line of said road . . . be and the same are hereby declared forfeited and restored to the public domain."

You state that "the portions of said road, which remain uncompleted, in any land grant State or Territory, are situated in the Territory of New Mexico—between Isleta and the eastern boundary of said territory—and in the State of California, between the Colorado River and San Buenaventura on the Pacific."

You also state that in your "opinion said act, not only forfeited the lands in question, but rendered them subject to settlement immediately upon its passage." In this view I concur. You call attention to the fact that the act of forfeiture fixes no price at which the restored lands are to be held, and you say, "The even numbered sections have heretofore been rated at double minimum price of \$2.50 per acre, but as the road has not been completed, and the grant has been forfeited, the reason for such enhanced rating has ceased to exist." You thereupon recommend that, as to the forfeited lands in New Mexico, you be authorized to instruct the local officers of the different districts in which the same are situated, "to give notice by publication for at least thirty days that said lands have been restored, and that the books of their respective offices are open for entry of the same at the rate of \$1.25 per acre, under the pre-emption and homestead laws and other laws relating to unoffered lands, and that the even numbered sections are reduced in price to \$1.25 per acre."

I approve of said recommendations, except in so far as they relate to the price to be fixed for said lands, whether in the odd or even sections.

The act of July 27, 1866 (14 Stat., 292), making the grant of land to aid in the construction of the Atlantic and Pacific Railroad, contained no provision raising the price of the even numbered or ungranted sections within the limits of said grant, but said sections were raised to the price of \$2.50 by virtue of the act of March 3, 1853 (10 Stat., 244), now to be found in section 2357 of the Revised Statutes. The odd numbered sections being granted to the railroad, of course there was no legislation affecting their price.

The price of the even numbered sections being thus raised by act of Congress, must remain as fixed thereby, unless some like authority be shown requiring and empowering their reduction. This reduction or authority to reduce is not to be found in the forfeiting act of July 6, 1886, either by expression or implication, its provisions being shortly stated in one paragraph and simply declaring the forfeiture, and that said lands be "restored to the public domain," as before quoted. If that act, instead of forfeiting only the lands coterminous with the uncompleted portions of the Atlantic and Pacific road, had repealed the granting act entirely, it could have been contended, with plausibility at least, that all the lands, along the line of said proposed road, were thenceforth to be treated as though the grant had never been made, and therefore were to be disposed of at \$1.25 per acre—the price at which they would have been disposed of, if the grant had never been made. But that is not the present case.

The original act is yet in force, with the provisions of the act of March 3, 1853, appreciating the price of the even numbered sections, attaching to them whenever they became identified by the definite location of said road, as fully as though part of the granting act. The effect of the forfeiting act being only to restore to the United States the full title to the odd numbered sections along certain portions of said line; but in no wise to affect the even numbered sections. This being so, I can find nothing in the repealing act to authorize the reduction recommended.

The only other provision of law that I am aware of having any relation whatever to the matter, or, which is claimed to have any bearing upon it, is section 2364 of the Revised Statutes, a revision of the act of July 2, 1864 (13 Stat., 374). This section provides that "whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price, not less than \$1.25 per acre, below which such lands shall not be disposed of."

The word "reservation," as here or elsewhere used in relation to the public lands, applies to such lands as, for any reason or purpose, have been excepted or reserved from settlement, entry, or other disposal, under the provisions of the general land laws. The even numbered

sections within railroad grants are not thus reserved, though spoken of in some granting acts as "reserved" to the United States from said grant; but on the contrary are universally held, and sometimes, as by the sixth section of the granting act in this case, expressly declared to be subject to settlement, etc., under the general laws; differing only from other public lands as to the price to be paid for them. The even numbered sections in the present case never having been in "reservation," but always open to disposal to the public, I am clear the above section of the Revised Statutes is not applicable to them.

In the previous legislation of Congress, when it has forfeited grants to other roads, no fixed rule has been followed, or well could be, because of the varying circumstance connected with the forfeited grant or the restored lands. Of the statutes, declaring such forfeiture, examined by me, I find that in most of them there has been no special provision in relation to the price at which either odd or even sections were thereafter to be sold, nothing being said on the subject. In other of the acts the restored lands were "to be disposed of hereafter as other public lands," or "disposed of under the general land laws." In the act of January 31, 1885 (23 Stat., 296), forfeiting the grant to the Oregon Central, the price of the lands was fixed at \$1.25 per acre, for both odd and even sections. By the act of February 28, 1885, forfeiting the grant to the Texas and Pacific, the price of the restored lands was fixed at \$2.50 per acre. Nor has the practice of the Land Department been uniform in the cases examined—the only ones I am aware of.

In the case of the New Orleans, Opelousas and Great Western Railroad, forfeited by act of July 14, 1870 (16 Stat., 277), the price of the odd sections was fixed at \$1.25, and no action was taken in relation to the even sections, the act providing only for the disposal as in the case of other public lands. In the forfeited grant of the Placerville and Sacramento Valley Railroad, April 15, 1874 (18 Stat., 29), both odd and even sections were placed at \$1.25 per acre, though no reduction of price was made by the forfeiting act, but only a direction to dispose of the lands as public land. In the case of the Stockton and Copperopolis Railroad grant, forfeited June 15, 1874 (18 Stat., 72), the same action was taken, in the absence of authority conferred by the forfeiting act. In the case of the St. Louis and Iron Mountain Railroad, lands forfeited by act of June 28, 1884 (23 Stat., 61), the odd sections were restored at \$2.50 per acre, and no change made in the price in the even sections, in the absence of any provision, other than that the lands were "to be disposed of under the general laws." And in the cases of the Oregon Central and the Texas and Pacific the special provisions of the forfeiting acts were followed.

Finding no legislative enactment, nor uniform line of departmental rulings, which might have weight as establishing a rule, I must decline to assent to the reduction of the price of the even numbered sections, below the sum of \$2.50, at which they were fixed by act of Congress.

With regard to the odd-numbered or granted sections, the case is different. The price of these was in no way affected by the grant to the railroad company. They were reserved by the act making that grant from disposition under the general land laws, for the purpose of aiding in the construction of the road. By the act of forfeiture they are now taken out of that "reservation" and restored to the public domain, and I think under existing law, as now found in section 2364 of the Revised Statutes, before quoted, authority is given to fix the price of such lands, provided it be not less than \$1.25 per acre.

Inasmuch as there is, in my opinion, no authority to reduce the price of the even numbered sections below \$2.50, it would obviously be very unwise to fix the price of the odd numbered sections, side by side with the former, below the same price. You will, therefore, instruct the local officers in New Mexico that the even and odd numbered sections within the forfeited limits will be disposed of at \$2.50 per acre, in accordance with the views herein expressed.

With regard to the forfeited lands along the uncompleted portions of the line of the Atlantic and Pacific Railroad in California, "between the Colorado river and San Buenaventura on the Pacific," you report, and one of the diagrams forwarded shows, that much of said lands are within the conflicting granted limits of the Southern Pacific Railroad Company.

In relation to this matter you say:

"Inasmuch as the grants to these companies were made by the same act, it follows, under the rule laid down by the Supreme Court, that the latter company is entitled to an undivided moiety of all lands in said conflicting limits. In allotting to the Southern Pacific Railroad Company its share of these lands, every other alternate odd numbered section (as sections 1, 5, 9, etc.,) can be set apart for said company, and the remaining odd numbered sections (as sections 3, 7, 11, etc.,) restored."

You thereupon suggest, "that the restoration of the lands in said conflicting limits be deferred until the proper officers of said company can be communicated with, and its formal consent to this or some other equitable division, secured." You also recommend that as to the remaining lands within the conflicting limits of the withdrawal for the Southern Pacific Railroad Company you be authorized to call upon said company to show cause why such lands should not be restored, and "that pending such action, the restoration of all lands within conflicting limits be deferred."

Understanding these recommendations to relate entirely to the odd-numbered sections, within the conflicting limits of the two roads; as much as I regret the necessity for any delay in the premises, I believe the course proposed is wisest in view of the complications existing, and therefore approve said recommendations. But prompt action should be taken so that the forfeited lands be opened to the public at the earliest possible day.

PRACTICE—CONTINUANCE—GOOD FAITH.

BENEDICT v. HEBERGER.

A continuance to ascertain the whereabouts of the entryman and procure his attendance properly refused where he was represented by counsel at the hearing, and the motion therefor was not filed until after the contestant had submitted his testimony.

Good faith not consistent with evident evasions of the law.

Acting Secretary Muldrow to Commissioner Sparks, December 11, 1886.

I have considered the case of Albert V. Benedict v. William Heberger, involving the SW. $\frac{1}{4}$ of Sec. 30, T. 117 N., R. 60 W., 5th P. M., Huron, Dakota, on appeal by the last named from your office decision of May 15, 1885, holding for cancellation his pre-emption cash entry of the tract described.

It appears that Heberger filed his declaratory statement October 9, 1882, with allegation of settlement August 9, 1882, and that he made final proof and payment for the land April 10, 1883. Subsequently, Benedict filed in the local office his corroborated affidavit, charging in substance that Heberger's proof was false and fraudulent and his entry illegal, in that he was at date of filing under twenty-one years of age, and consequently not a qualified pre-emptor; also that he never established a residence upon the tract, nor did he cultivate and improve the same as required by law. Said affidavit was, on January 4, 1884, forwarded to your office, where, after an examination of the charges, direction was given that a hearing be ordered to afford Mr. Benedict an opportunity to submit evidence in support of his allegations.

Hearing was duly had, at which contestant appeared and submitted testimony to show that claimant had not built a habitable house upon the tract and that he had not resided thereon.

The entryman was not present at the hearing, nor was any testimony offered in his behalf. He was, however, represented by attorneys, who cross-examined plaintiff's witnesses at considerable length. When the examination of said witnesses was concluded, counsel for defendant moved a continuance to enable them to ascertain his whereabouts and procure his attendance. This motion was overruled by the local office and your office decision sustains the ruling. It also affirms the finding of the local office, to the effect that the allegations of plaintiff are sustained by the testimony, and that the entry should be canceled.

After a careful examination of the record as made in the case, I concur in the conclusion arrived at by your office. To my mind, it is manifest from the evidence that Heberger never resided upon the tract, and that his so-called settlement, residence and improvements were a mere pretence, with a view to acquiring title to the tract under color of

the pre-emption law, while evading its plainest requirements. He testified, in making final proof, that he had done no breaking on the tract; that his only improvements were a house, eight by ten, and a well, and that said improvements were worth \$150.

The testimony taken at the hearing shows that the value of the improvements was not to exceed \$25; that the entryman never occupied the house as a place of residence, in fact that it was not habitable, and that what the proof termed a well is not worthy of the name. No furniture, stove, nor cooking utensils were ever seen in the shanty. On the outside, looking from a distance, one might suppose there was a stove inside, because a stove pipe appeared to project through the roof, but a closer examination showed that there was no hole in the roof through which it could pass, but that it was tacked to the roof, thus giving the shanty the appearance of having a stove within. Such a subterfuge as this, of itself goes far to show a premeditated purpose to mislead and deceive.

Upon a full consideration of all the facts and circumstances, I have no hesitation in concluding that the entry was made in bad faith, without compliance with the law, and with a studied purpose to evade its requirements.

I therefore affirm your office decision.

RAILROAD GRANT—SETTLEMENT CLAIM.

RAMAGE *v.* CENTRAL PAC. R. R. CO.

The pre-emption law not only conferred a preferred right of purchase, but also legalized settlement on the public lands with a view to cash entry, and made such settlement, by a qualified person, the basis of a claim against the United States.

The residence and possession of a qualified pre-emptor covering the date of the grant, withdrawal, and definite location excepted the land from the operation of the grant, though the settler subsequently abandoned said land and perfected a pre-emption claim elsewhere.

Secretary Lamar to Commissioner Sparks, December 14, 1886.

I have considered the case of Charles Ramage *v.* The Central Pacific Railroad Company, on appeal from your office decision of May 8, 1885, adverse to the company.

The tract involved consists of lots 1 and 2, and the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 3, T. 2 S., R. 2 W., M. D. M., San Francisco, California, and is claimed by Ramage under the pre-emption law, while the company asserts claim to it under the grant of July 1, 1862 (12 Stat., 489). The facts as disclosed by the record in the case appear substantially as stated in the decision appealed from, and are not denied by appellant. It is

admitted by the company that James Ramage occupied the tract, residing upon and improving the same from 1860 to 1869, when he sold his possessory claim and improvements; but it is alleged that because he, while holding said tract, purchased the possessory right to certain land in section 2, adjoining, which he subsequently, in 1878, filed upon as a pre-emptor, and afterwards transmuted to homestead, upon which he made final proof in April, 1884, therefore his occupation of the tract in dispute did not confer such a right thereto as would except it from the operation of the grant.

This contention can not be sustained. James Ramage appears to have been a qualified pre-emptor. He testified at the hearing that he established his residence upon the tract in 1860, with the intention of pre-empting the same as soon as he could do so, and that he resided there with his family until 1869. It is in evidence that his house and other improvements were worth at least \$1,000. He could not during the time he resided there file for the land, for the reason that it had not been surveyed. The survey was not made until 1878. His possession of and residence upon the tract covered the date of the grant to the railroad company, the date of the withdrawal on account thereof, and the date of definite location of the line of road. The fact that he changed his intention in 1869 and left this land, and afterwards, in 1878, settled upon and claimed under the pre-emption law another tract, does not, as argued, affect the question at issue. It does not change the fact that the settler had during the time he was upon the land a pre-emption right to said land by virtue of his settlement and residence thereon. The pre-emption law did more than create a right of pre-emption, or of purchase before others; it legalized settlement on the public lands with a view to cash entry, and made such settlement by a qualified person the basis of a claim against the United States; "it protected settlements already made, and allowed future settlements to be made with a right of pre-emption." *Emmerson v. Central Pacific R. R. Co.* (3 L. D., 271); *Johnson v. Towsley* (13 Wall., 72). That James Ramage did not remain on the land until survey and consummate his claim, does not change the rule above enunciated, nor prevent its application to this case.

It is sufficient to know that he had a settlement claim capable of being perfected, in order to determine that the tract did not pass to the company under its grant. This being determined, it follows that the tract is subject to pre-emption and that Charles Ramage, who it appears came into possession by purchase of the improvements, and who made settlement in 1872, and has since resided upon the tract with his family, is not barred by any claim of the railroad company from filing for and entering the same under the pre-emption law.

Your office decision is affirmed.

PRACTICE—REVIEW—STANDING OF TRANSFEREE.

CYRUS H. HILL.

A decision, rendered on the appeal of an entryman, rejecting his final proof, will not be reviewed on the allegation of a transferee that he did not receive notice of such decision.

Secretary Lamar to Commissioner Sparks, December 14, 1886.

I am asked by Mr. L. H. Hole, attorney for the U. S. Mortgage Co. and Elizabeth H. Richardson, to review and revoke departmental decision of October 6, 1886, directing the cancellation of the homestead entry of Cyrus H. Hill, made December 6, 1883, at Huron, Dakota, for the SE. $\frac{1}{4}$ of Sec. 26, T. 111, R. 67, which was commuted to cash, final proof made thereon, and certificate issued December 9, 1884. And it appears, by the present application, that on the day after the issue of the final certificate, the land was mortgaged by Hill to the Mortgage Company, for the sum of \$300; and that on May 5, 1885, the Company assigned the mortgage, received from Hill, to Elizabeth H. Richardson.

The application for review is based substantially upon two general grounds: 1st, that said Richardson had no notice of the Commissioner's decision, nor an opportunity to present her rights or equities, or to show that the claimant has complied with the law. 2d, That the cancellation of said entry was contrary to law and the evidence.

With regard to the first point made, it is sufficient to refer to the case of John C. Featherspil (4 L. D., 570) wherein it was said that in the determination of that case, "the fact that there is a mortgagee now interested in maintaining the validity of the entry brings no new element into the consideration thereof, inasmuch as he can have no better right than the entryman would have if present, and with whose rights the government deals only, regardless of any sale, assignment, or lien made by him to third parties; recognizing, however, the right of said third parties, where their rights have been acquired subsequently to the issue of final certificate, to appear and protect the same by showing proper compliance with the requirements of the law on the part of the entryman."

In the case under consideration, there was nothing in the record to show that Hill had mortgaged the tract in question; and it was no part of the duty of the United States officers to search the records in the proper territorial office to ascertain whether any transfer of said land had been made or lien placed thereon by him, in order to send notice of the rejection of the final proof to such transferee, or lienor. Notice was sent to the entryman, an appeal was taken by him, and on said appeal the judgment of your office was affirmed. There is, therefore, nothing in the first point to require the revocation of my former decision.

The second ground relates entirely to the sufficiency of the testimony submitted by Hill, in relation to his residence upon the land. A re-examination of said testimony, so far from showing any cause for revoking the former decision, serves to confirm strongly the views therein expressed.

I therefore deny the present application.

PRACTICE—STARE DECISIS—ACTING SECRETARY OF THE INTERIOR.

REES v. CENTRAL PAC. R. R. CO. (ON REVIEW.)

When a point has been settled by decision it forms a precedent, which the Department will not depart from, unless clearly contrary to principle.

In accordance with the law creating the office of Acting Secretary of the Interior, the decision of such officer is in effect the act of the Secretary.

Cases will not be referred to the Attorney-General for his opinion, except where the Secretary is in doubt as to the correct conclusion.

Secretary Lamar to Commissioner Sparks, December 15, 1886.

I herewith transmit the papers accompanying motions of counsel for plaintiff in the case of Thomas Rees v. The Central Pacific R. R. Co., for a review of departmental decision of August 14th, last, adverse to him. Said motion and the argument in support of it I have carefully considered, and I fail to find any good reason for granting it.

In that opinion the Acting Secretary held that nearly all the questions involved in the case had already been ruled upon by this Department in other cases, and the patented and out boundaries of the Mexican grants therein referred to defined thereby, as well as the construction to be given to the particular railroad grants under consideration. He might well have rested his conclusions upon the well recognized doctrine of *stare decisis*, for it is a general maxim when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from, unless clearly contrary to principle. It should require very controlling considerations to break down a former decision and lay anew the foundations of the law. He held, however, that inasmuch as Rees was not a party to the proceedings in any former case, nor the particular tract of land the subject of controversy, and that other interests in similar cases were before the Department, he would consider anew all the matters presented by the record. The decision proceeded at great length to consider *seriatim* all the questions involved. After full consideration of all the testimony in the case, and the arguments of counsel presented in their respective briefs, the conclusions of that decision were, first, that the land in controversy was never within the granted, claimed, or confirmed limits of the Moraga grant; second, that it was never within the granted, claimed, or confirmed limits of the Sobrante grant; and third, that it was within the claimed limits of the San

Lorenzo grant, but was excluded therefrom by the final survey of that rancho at a date anterior to the time when the grant to the railroad company became operative, and that the land passed to the railroad company under its grant.

On the 7th day of October, 1886, B. B. Newman, attorney for Thomas Rees, filed before A. C. Blanchard, register of the land office at San Francisco, California, a motion for review and re-consideration of the decision of the Acting Secretary which has been duly transmitted to this Department. It presents substantially the following points for my consideration :

First.—That Rees *et al.* were not afforded any opportunity to present evidence or argue their cases before the Acting Secretary, by whom the decision of August 14th, 1886, was made.

Second.—That the cases were argued before the Secretary, by whom no decision was made.

Third.—That the decision of the Acting Secretary is against and contrary to the law and the evidence referred to in it.

The decision of the Acting Secretary was made upon a full consideration of the evidence and arguments adduced by Thomas Rees *et al.*, and after full consultation with the Secretary who concurred in the conclusion reached. His decision was the act of the Secretary in every sense, and to hold otherwise would defeat the object of the law in providing such an officer for this Department. The other assignment that the decision was contrary to the law and the facts is considered and adjudged unfounded.

I notice the forcible effort made by counsel to show that the true location of the southern boundary of the Moraga grant, when properly located, did embrace the land in controversy. This position was strenuously contended for in the argument of counsel before, both orally and by printed brief. I have fully considered this question, have examined all the facts disclosed, and I can find no error in the conclusion reached by the Acting Secretary. To meet and answer anew all the assertions of fact, made in the present motion, would require a re-statement of the whole case and at last end in repetition of the decision already made, which is wholly unnecessary.

The only new matter presented by the motion is that certain lands in township 2 S., range 1 W., M. D. M., surrounding the land in controversy, are opposite the first completed section of twenty miles of road extending from San Jose northward, and were selected by the Western Union Pacific Railroad Company, to which the Central Pacific is successor, on December 11, 1866.

The records of the Land Office show that list numbered two, referred to in the motion of counsel, was selected December 11, 1866, and did embrace lands in township 2, 3, 5 and 7 S., and range 1 W. and 1 E., but the records also show that this list, on receipt at the General Land Office, was suspended, and across it was written "suspended because selected beyond the completed first section of twenty miles."

The decision of August 14th holds that the company's right to these lands did not attach until the President's acceptance of the road opposite thereto, on January 21, 1870, and the lands in list numbered 2, selected as aforesaid, were not patented to the company until May 21, 1870, subsequent thereto. As a question of fact, the records of the Land Office conclusively support the statement of facts made by the Acting Secretary and he was manifestly correct in the conclusion reached.

The argument against the conclusion of law in the former decision, viz.: That lands public in every sense at the date when the line of road was definitely fixed passed under the grant adds nothing to what was before said in argument and fully considered. The decision upon these points properly construed the law applicable to this case, and this opinion is strengthened by the recent decision of the supreme court of the United States in the case of *Buttz v. the Northern Pacific Railroad Company* (119 U. S., 55).

I find in the papers in the case a motion that this entire case should be referred to the Honorable the Attorney General of the United States for his opinion and advice on the decision aforesaid, under the authority of the United States Revised Statutes, which provides that "the Attorney General shall give his opinion in writing when requested by the President or by the head of a Department."

It has been the practice of this Department under its present management to refer matters and cases to the Attorney General for his opinion wherein the Secretary is in doubt as to a correct conclusion. In this case I have no doubt, and therefore both motions are denied.

ENTRIES AND FILINGS ON SWAMP LANDS.

CIRCULAR.

Commissioner Sparks to registers and receivers, December 13, 1886.

The rules heretofore in force relative to the admission of entries and filings on lands selected (and prior to their approval and certification by the Secretary of the Interior) as "swamp and overflowed and rendered thereby unfit for cultivation," are hereby modified as follows:

1. When any settler upon such lands or applicant to enter the same under the public land laws of the United States shall apply to make a filing or entry under said laws, accompanied by a statement under oath corroborated by two witnesses, that the land in its natural state is not swamp and overflowed and rendered thereby unfit for cultivation, the register and receiver will allow such filing or entry "subject to the swamp land claim."

2. Upon the admission of any such filing or entry the register will at once notify the governor of the State thereof, and allow him sixty days

within which to object to the perfection of the entry and to apply for a hearing in behalf of the State to prove the swampy character of the land.

3. When a hearing is ordered between the State and claimant under the public land laws, the burden of proof will be upon the State to establish the character of the land.

4. When no protest or application for a hearing is presented on the part of the State, as herein provided, the State will be deemed concluded from thereafter asserting a claim to the land under the swamp land grant.

5. The foregoing applies only to those States whose claims are adjusted by examinations in the field.

6. Where swamp land selections are based upon the field notes of survey, and the land is alleged not to have been in fact swamp and overflowed, and rendered thereby unfit for cultivation at the date of the swamp land grant, the burden of proof will be upon the contestant or adverse claimant under the public land laws.

7. You will promptly advise this office when notice is given the governor in any case, stating the date of such notice, and the description of the land involved. You will also duly report the governor's action in each case.

Approved:

L. Q. C. LAMAR,
Secretary.

RAILROAD GRANT—SUIT TO VACATE PATENT.

MISSOURI, KANSAS & TEXAS RY. CO.

The Department adheres to its former recommendation of suit to vacate patents issued to this company for certain even sections of land in Allen County, Kansas. The case of the Kansas City, Lawrence and South Kansas R. R. Co. v. Benjamin Harris Brewster cited and distinguished.

Acting Secretary Muldrow to Attorney General Garland, December 17, 1886.

I have the honor to acknowledge the receipt of your letter of the 12th instant, transmitting a letter from one John S. Martin, of Moran, Kansas, asking that the suit recommended on June 16, 1886 (4 L. D., 573), be dismissed. As grounds for such request, Mr. Martin refers vaguely to an "opinion of the Supreme Court." I suppose the reference to be to the case of the Kansas City, Lawrence and South Kansas Railroad Company v. Benjamin Harris Brewster, Attorney General, decided by that court November 8, 1886. After an examination of the opinion in that case, I can not see that it conflicts in any manner with my said recommendation, or with the issues in the suit commenced pursuant thereto. The recommendation of this Department of June 16,

1886, was that suit be instituted to set aside patents issued to the Missouri, Kansas and Texas Railway Company for *even* sections in its indemnity limits, (1) where they overlap the granted limits of the Leavenworth, Lawrence and Galveston road, and (2) where they overlap the indemnity limits of said road, in so far as they lay in Allen County, Kansas.

The case above referred to involved the title to *odd* sections only, lying in the common indemnity limits, and in no manner referred to the even sections. This is stated in the bill and admitted in the answer, upon which the issues were joined. The Leavenworth, Lawrence and Galveston road had relinquished all claim to such sections to the Missouri, Kansas and Texas Company and that company took patents for the same and assigned them to the Kansas City, Lawrence and South Kansas road, the successor of the Leavenworth, Lawrence and Galveston. The remaining pertinent facts of that case are as follows:

An act of Congress, approved March 3, 1863, granted to the State of Kansas, for the purpose of aiding in the construction of the Leavenworth, Lawrence and Galveston railroad, and the Atchison, Topeka and Santa Fé railroad, with a branch down the valley of the Neosho River, in said State, "every alternate section of land designated by odd numbers, for ten sections in width on each side of said road and each of its branches." The act also provided for indemnity for lands lost, by selections from the odd sections in a strip ten miles wide on each side of said roads. The Atchison, Topeka and Santa Fé R. R. Co. did not build said branch, but, on March 9, 1866, assigned all its interest and right in the same to the Union Pacific Railroad Company, Southern Branch (afterwards known as the Missouri, Kansas and Texas R. R. Co.). The act of July 26, 1866, made a similar grant to said State, for the purpose of aiding the U. P. R. R. Co., Southern Branch, also extending down the valley of the Neosho and through the same lands, providing however that indemnity might be taken "from the public lands of the United States" nearest to the granted sections. Under this latter act the road was constructed, and near the southern boundary of Allen county crossed the Leavenworth, Lawrence and Galveston road (of which the Kansas City, Lawrence and South Kansas road is the successor). Hence the conflict in question between the indemnity limits of the two roads. Such being the facts, it was insisted by counsel that the lands in question became appropriated by the act of 1863 to the building of the southern branch of the Atchison, Topeka and Santa Fé R. R., and that the grants of 1863 and of 1866, instead of being made by Congress in aid of one and the same road, are different and conflicting grants, and that the earlier grant prevents the Missouri, Kansas and Texas R. R. Co. from realizing the bounty of Congress on that subject, because there is in the latter grant an express reservation of any lands granted previously for railroad purposes, as follows: "Provided, that any and all lands heretofore reserved to the United States by any

act of Congress for the purpose of aiding in any object of internal improvement be and the same are hereby reserved to the United States from the operations of this act." But the court found that the Missouri, Kansas and Texas Company had become possessed by assignment of all rights under the act of 1863; that Congress was aware of this fact; that the two acts are to be taken and construed *in pari materia*; that the only object was the building of one road, and that Congress "intended by the latter act to ratify and make good the right which the Union Pacific R. R. Co., Southern Branch, already had to the same lands, for the purpose of building that road." This reasoning can not apply to the *even* sections, for none of the acts authorized the selection of even sections, except the act of 1866. So far from militating against the said recommendation, the language of the court foreshadows a favorable decision in the case in question, for after stating the argument based on the above quoted proviso the court says: "If the Atchison, Topeka and Santa Fé R. R. Co. had built a line of road along the same general course and through the same lands, twenty miles in width, that the Missouri, Kansas and Texas R. R. Co. has occupied with its road, and asserted a claim to these lands, or to any of them, *the argument would be almost irresistible.*" Now, this language describes just the status of the lands in question, as far as they lie in the granted limits of the Leavenworth, Lawrence and Galveston Co. That company did build its road "through the same lands," and asserted a claim to them. Whether the language of the court applies to the sections in the common indemnity limits, does not seem necessary to determine. It is sufficient to say that the *even* sections were not under discussion at all. I can find no reason in said decision for modifying the former recommendation.

RESIDENCE—PUBLIC OFFICIAL.

LEON E. LUM.

The residence of a public official is presumptively consistent with the law creating the office.

Acting Secretary Muldrow to Commissioner Sparks, December 17, 1886.

I have considered the case of Leon E. Lum, involving pre-emption cash entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 4, T. 134, R. 27, St. Cloud, Minnesota, containing 153.22 acres, on appeal from the decision of your office, dated July 19, 1885, holding said entry for cancellation.

It appears that the facts are as follows: Lum made his settlement January 5, 1883, erecting a frame building, twelve by fifteen feet. Some two or three months afterwards, he built a log house, eighteen by twenty-two feet, and a stable twelve by twenty-six feet. There was a

floor in the house, and both the house and barn had a board roof covered with tar paper. After final proof, he dug a well and curbed it up, adding a board partition to the house, two doors and a window. The stable was enlarged to twenty-six by thirty-eight feet. About two acres of land were broken, and planted with potatoes, turnips and other vegetables. The improvements were worth \$250 or thereabouts. Lum paid the double minimum price for the land, \$2.50 per acre.

It appears that Lum never actually established a residence upon the land. It does not appear in the record that the claimant ever slept on the land, while it does appear that William Seeley, a witness on behalf of the claimant, had the use of the house and barn as a logging camp for "a part of the summer and the winter of 1884."

Mr. Lum's attempt to establish and prove a residence is moreover inconsistent with his position as city attorney at Brainerd, which from the records it is proved that he held. The seventh section of article seven of the Constitution of the State of Minnesota, amended November 3, 1868, reads as follows:

"Every person who by the provisions of this article shall be entitled to vote at any election, shall be eligible to any office, which now is or hereafter shall be, elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this constitution, or the constitution and laws of the United States."

For these reasons I affirm your decision of July 19, 1885, and direct that the entry be canceled.

PRIVATE CLAIM—JURISDICTION—INDEMNITY SCRIP.

JOHN SHAFER.

When the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity.

The jurisdiction appearing, the same presumption of law arises that it was rightly exercised, as prevails with reference to the action of a court of superior and general authority.

In a claim for indemnity scrip under the third section of the act of June 2, 1858, it must appear that the alleged basis for indemnity was not embraced among the claims expressly excepted from confirmation.

Secretary Lamar to Commissioner Sparks, December 15, 1886.

By the treaty of Paris, signed on the 30th of April, 1803, and ratified on the 21st of October in the same year, France ceded the Louisiana territory to the United States (8 Stat., 200). Congress thereupon passed the acts of April 25, 1812 (2 Stat., 713), and March 3, 1819 (3 id., 528), providing for ascertaining and adjusting the titles and claims to lands in that part of the said territory which lies east of the Mississippi River and the Island of New Orleans, and west of the River Perdido.

Pursuant to these acts of Congress this part of said territory was divided into two land districts, between which Pearl river was the boundary; and for each of which districts commissioners for land claims were appointed. In obedience to these laws the Commissioners, Crosby and Skipwith, of the St. Helena district of Louisiana, on the 24th of July, 1821, made their report and recommended for confirmation a list of settlement claims in their district. In said list and numbered 190, is found the claim of John Shafer. This report is now published in Volume 3, American State Papers—Green's Edition—page 447.

These claims were confirmed by the acts of Congress approved May 8, 1822 (3 Stat., 707), and August 6, 1846 (9 id., 66). The confirmation under the third section of the act of 1822 is in the following language:

"The persons embraced in the lists of actual settlers, or their legal representatives, not having any written evidence of claim reported as aforesaid, shall, when it appears by the said reports, or by the said lists, that the land claimed or settled on had been actually inhabited or cultivated by such person or persons in whose right he claims, on or before the fifteenth day of April, 1813, be entitled to a grant for the land so claimed or settled on as a donation: *Provided*, That no lands shall be thus granted which are claimed or recognized by the preceding sections of this act, or by virtue of a confirmation under the said act of 1819."

And the concluding part of the act of 1846 provides: "But this confirmation shall in no manner affect prior rights, and shall only amount to a relinquishment on the part of the United States."

At a succession sale of the estate of the deceased confirmee, had on the 19th of March 1872, in pursuance of a decree of the parish court in and for the parish of St. Helena, Louisiana, this inchoate claim was purchased by John G. Cole and Company, of said parish, in whose name an application was made to the surveyor-general of Louisiana, on the 29th of the following June, for indemnity scrip under the third section of the act of June 2, 1858 (11 Stat., 294).

For some reason or other, which does not appear in the record before me, the scrip was not prepared by the surveyor general, and nothing further appears to have been done in relation to the same for more than ten years, when the surveyor-general reported that this claim together with some others was suspended under the ruling in the well known case of Joshua Garrett (2 C. L. L., 1005).

In the course of official business the case came before your office where a final decision against the right of said Cole and Company to receive scrip for this claim under the said act of 1858 was rendered January 29, 1884. The grounds upon which said decision was based are, First, That inasmuch as there were certain restrictions on this claim, and certain provisos in the confirmatory acts of Congress, therefore no certificates of location ought to issue until the actual or approximate locus of the land claimed by Shafer should be shown. This was following the rule in the case of Madam Bertrand (Land Office Report

for 1879, p. 215). Second, That even were it ascertained that certificates should issue on this claim, the parties applicant therefor have not shown themselves to be entitled to them, because the ruling in the "Garrett" case (*supra*) had not been complied with.

From said decision an appeal was brought here, and the questions involved in the case have been very carefully considered, counsel for appellants having been heard orally and also by brief. The main grounds urged in the appeal against the decision below, are, that the case upon which it is based, namely the "Bertrand" case, and the "Garrett" case are erroneous expositions of the law in relation to such matters, and for that reason they should be overruled.

Now, the "Garrett" case *was* overruled by this Department on the 17th of September last, in the case of Lettrieus Alrio (5 L. D., 158); but as the succession proceedings in the matter of this claim were had in a differently constituted court and under a somewhat different judicial system, from those in the "Alrio" case, I have examined this question anew, as to its applicability to the present case.

The first question to be considered thus becomes: Are the purchasers of said claim at the judicial sale aforesaid the legal representatives of the said John Shafer?

As already stated, the proceedings in the matter of the succession of John Shafer were had in 1872. They were therefore under, and in conformity to the judicial system of Louisiana, as it existed under the State constitution of 1868. For be it remembered that the act of 1858 recognizes as the legal representative of a confirmee in the particular case him, who, under local law, is the owner of the claim.

Article 73 of the Constitution provides: "The judicial power shall be vested in a supreme court, in district courts, *in parish courts*, and in justices of the peace." Article 87. "... All successions shall be opened and settled in the parish courts; and all suits in which a succession is either plaintiff or defendant may be brought either in the parish or district court, according to the amount involved."

A further examination of the statutes of the State discloses the fact, which is conceded here by the appellant, that the parish court of St. Helena is a court of special and limited jurisdiction, as that term is generally understood and used. Now, it is well settled in jurisprudence, that the judgment of a court of limited jurisdiction can be inquired into only so far as the inquiry relates to the facts necessary to *confer jurisdiction*, but no inquiry can be made beyond the jurisdictional facts. (Wells on Res Adjudicata and Stare Decisis, 341-3; and *Secombe v. Railroad Company*, 23 Wall., 108). And in the case of *Comstock v. Crawford* (3 Wall., 396), the court say, with reference to the general question before me for consideration:

"It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The

jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority. . . . When by the presentation of a case within the statute the jurisdiction of the court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the court can be collaterally assailed. . . . The sufficiency of the proof upon which the court took its action is not a matter open to consideration in a collateral matter. It does not touch the question of jurisdiction."

Now what are the jurisdictional facts appearing upon the face of the record in the case under consideration ?

An inspection of the transcript of the record of proceedings of the parish court, parish of St. Helena, in the matter of this succession shows the necessary facts to confer jurisdiction under the Louisiana law. Section 3691 of the Revised Statutes of Louisiana, 1870, provides: "Whenever it shall be found by the clerk that a succession is so small that no person will apply for, or accept the curatorship, the clerk shall assume the administration of such succession, *provided*, the value of such succession is not more than \$500."

Article 1114, Civil Code: "He who claims the curatorship of a vacant succession, or one of which the heirs or part of them are absent and not represented must present his petition to that effect to the judge of the place where the succession was opened."

It is shown by the record that John H. Pipes, clerk of the parish of St. Helena, presented his petition to the judge of that parish, setting forth: "That John Shafer departed this life in said parish intestate, leaving the property described of less value than \$500, and that he had no heirs present or represented in the State." In the language of the supreme court in the case of *Comstock v. Crawford* (supra), "These recitals in the petition and in the record are *prima facie* evidence of the facts recited, and show the jurisdiction of the court over the subject. What followed was in the exercise of its judicial authority, and could only be questioned on appeal."

The effect of these succession sales and the force and effect that is given to a judgment or decree of the court in relation to them in the State of Louisiana, and also the weight that should be given them in the executive departments of the general government, were very fully discussed in the late case of *Lettrieus Alrio* (supra), which was in many respects analogous to the one under consideration, and nothing further need be said here in relation to those matters. Suffice it to say, that from what has already been said herein, and for the reasons assigned for the conclusion reached in the "Alrio" case, I am clearly of opinion that the purchasers of this inchoate claim at the succession sale aforesaid, the present applicants herein, should be considered as the legal representatives of the said John Shafer, and should receive the scrip applied for, unless said scrip should be withheld for some other reason.

The only other reason for withholding said scrip is found in the first objection noted by the Commissioner of the General Land Office, heretofore set out in detail. And to this question our attention will now be directed.

The concluding part of the third section of the act of 1858, under which the present application is made provides:

"That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions."

In the examination of this question two inquiries present themselves for consideration: First, Was the confirmation before mentioned, such a confirmation as the act of 1858 contemplated? Second, If so confirmed, does the claim for any reason mentioned in said act remain unsatisfied?

Now, in the report of the Commissioners, Cosby and Skipwith, the settlement claim of John Shafer is said to lie in the parish of St. Helena, and the date of the inhabitation and cultivation is given as 1809. This claim, then, is within the provisions of the confirmatory acts in so far as the date of inhabitation and cultivation is concerned. Recurring now to the acts of confirmation, it is to be noted that these settlement claims were not confirmed *absolutely* for a certain number of acres of land, but only *qualifiedly*, or under certain restrictions. In other words, the claim confirmed was a mere contingent grant, valuable only in case it did not embrace lands claimed or recognized by the first two sections of the act of May 8, 1822, or by virtue of a confirmation under the act of March 3, 1819. The language of these confirmatory acts is express upon this point, and can not be misunderstood. It is: "No lands shall be thus granted which are claimed or recognized by the preceding sections of this act, or by virtue of a confirmation under the act of March 3, 1819." And again: "But this confirmation shall in no manner affect prior rights, and shall only amount to a relinquishment on the part of the United States."

The two "preceding sections" of the act of 1882 had reference to claims to land derived from British or Spanish authorities, reported to the Commissioners and recognized by them as valid and complete titles agreeably to the laws, usages and customs of the said governments; and also all claims reported to the Commissioners founded on orders of survey, requettes, permission to settle, or other written evidence of

title. And the act of 1819 had reference to claims of the same nature as those referred to in the first two sections of the act of 1822. So that, if this claim of John Shafer embraced lands included within any of the other classes of claims mentioned in the act of 1819 or the act of 1822, to that extent it was not confirmed. In other words, to that extent it was no claim at all, within the meaning of the act. The act in effect granted and confirmed to these settlement claimants only so much land as they claimed, with this condition, that such lands were not embraced within any claim of the other classes therein mentioned. This raises a question of fact, and the first thing to be shown by the applicants for scrip herein, is, that the claim of John Shafer did not embrace lands included within any claim of the other classes mentioned in the confirmatory acts. Until this be shown there is no basis for indemnity under the act. That is to say, there is no showing made that the claim in question has been confirmed by Congress for any definite amount of land. True, these settlement claims were usually for six hundred and forty acres, never exceeding that amount; and from a certificate of the register and receiver at the New Orleans Land Office, dated July 8th, 1872, it is ascertained that the claim of John Shafer was confirmed under the act of 1846 for six hundred and forty acres. But neither in this certificate nor in the report as published in Green is there any description of the claim either by metes and bounds or otherwise. So that considering this certificate in connection with the confirmatory acts only goes to confirm the conclusion hereinbefore arrived at with reference to this claim. This conclusion is also strengthened by reference to section 4 of the act of 1822, for in that section the register and receiver are invested with the power of directing the manner in which claims should be located and surveyed, and power also to decide between parties whose claims conflicted. And reference is made to claims such as the one under consideration.

I therefore conclude that there is not sufficient showing here to warrant the issuance of scrip under the act of 1858, that the basis for such indemnity scrip is not shown, and that until such basis be shown no scrip should issue on this claim. For under the act of 1858, which on this point is clear and unambiguous, scrip is to issue only when the "land claim has been confirmed by Congress and the same in whole or in part, has not been located or satisfied," and is to be issued "for a quantity of land equal to that so confirmed and unsatisfied"; and in this case, as has been clearly stated, the difficulty lies in the fact that from the present record, it can not be ascertained what was confirmed, and what remains unlocated and unsatisfied.

This view of the case renders it unnecessary to consider the question argued by counsel for appellants herein, that the act of the surveyor general in passing upon claims and issuing scrip therefor, is not subject to the control of the Commissioner of the General Land Office or any

other authority, for as before stated the surveyor general never did issue scrip on this claim.

This case not being precisely similar to the "Bertrand" case, that case is not relied on herein, and no opinion is expressed concerning the correctness of the ruling therein.

The decision appealed from is modified in accordance with the views above expressed.

SOLDIERS' ADDITIONAL HOMESTEAD ENTRY—SETTLEMENT.

OLIVER v. THOMAS ET AL

A soldiers' additional homestead entry, made through an agent, in conformity with the practice authorized by the Department, is a valid appropriation of the land covered thereby.

No rights, under the pre-emption law, are acquired by settlement upon land segregated from the public domain.

Nor will a settlement of such character create any right to pre-empt an adjoining tract of public land.

Secretary Lamar to Commissioner Sparks, December 16, 1886.

This controversy relates to the NE. $\frac{1}{4}$ of Sec. 12, T. 2 S., R. 2 W., M. D. M., San Francisco, California, the material facts in the case being substantially as follows :

The township plat was filed in the local office July 8, 1878, and on the same day soldiers' additional homestead entry No. 3254 was made in the name of one George W. Thomas, for the E. $\frac{1}{2}$ of the quarter above specified. Four days thereafter (July 12, 1878) Frank Oliver filed declaratory statement No. 14,358 for the entire quarter, alleging settlement October 1, 1877, and on the 8th day of November, 1883, Antone Gomez made homestead entry No. 5663 for the W. $\frac{1}{2}$ of the quarter.

On the 22d of November, 1883, Oliver offered his final proof for the entire quarter, the other parties in interest appearing and cross-examining his witnesses, but offering no testimony in their own behalf.

Upon the testimony thus adduced, the local office decided that the soldier's additional homestead entry of Thomas embracing the E. $\frac{1}{2}$ of the quarter should stand, and that Oliver should be allowed to enter the W. $\frac{1}{2}$ of the quarter under the pre-emption law.

Upon appeal this decision was affirmed by your office October 7, which was adhered to upon review October 25, 1884, and the homestead entry of Gomez was held for cancellation.

From these decisions separate appeals have been filed on behalf of Oliver and Gomez. Oliver appeals from that part of said decision which awarded the E. $\frac{1}{2}$ of the quarter to Thomas, alleging two grounds of error : First, That the homestead entry of Thomas is invalid for the reason that it was not made by him in person; Second, That the decision appealed from is contrary to the evidence in that it finds Oliver's settlement to have been made in the fall of 1879 instead of October 1, 1877, as alleged by him.

Gomez appeals from that part of said decision awarding the W. $\frac{1}{2}$ of the quarter to Oliver, and holding his (Gomez's) homestead entry thereof for cancellation, alleging five grounds of error: First, That Oliver's residence and principal improvements being on the tract embraced in the entry of Thomas were not on public land, and therefore no right to said W. $\frac{1}{2}$ of the quarter could be acquired by reason of them under the pre-emption law; Second, That Oliver's declaratory statement having been filed before his actual settlement was for that reason void; Third, That Oliver's claim was illegal in that it was asserted in the interest of one Bellina. The fourth and fifth allegations were merely a summary of the ones preceding and will not be set out in detail.

An examination of the testimony shows that at the date of Oliver's alleged settlement and long prior thereto this section of land was included within a large enclosure claimed by one Antone Bellina, and in his possession and use until the fall of 1879. Bellina is the step-father of Oliver's wife. During the time Bellina was in possession of this tract Oliver was his hired man, lived with his family on other land within the enclosure, slept occasionally in a small cabin on the tract in controversy, cultivated it for Bellina, and received for his services about \$600 per annum and board for himself and wife. Some time in the fall of 1879 Oliver purchased of Bellina the possessory right to the quarter in controversy and the improvements thereon, and then for the first time moved his family on the land and established a *bona fide* residence there. He built an addition to the cabin thereon and has continued to reside there ever since. His residence and main improvements valued at about \$700 are upon the E. $\frac{1}{2}$ of the quarter, the tract embraced in the entry of Thomas before mentioned. He has about one hundred and forty acres of the quarter under cultivation.

From this finding on the evidence, it is readily seen that Oliver's allegation of error is not well taken; and that your office was not in error in finding that Oliver's settlement and residence on this quarter commenced in the fall of 1879. His claim to the E. $\frac{1}{2}$ of this quarter must therefore fail, unless he succeeds on his first allegation of error, viz: That the soldier's additional homestead entry in the name of Thomas is invalid and illegal.

This entry, as already stated, was made July 8, 1878, under Sections 2304 and 2306, U. S. Revised Statutes, and was therefore made when the practice under the circular of December 1, 1877, was in force. Section 2304 of the Revised Statutes allows certain privileges in the matter of making homestead entries to all honorably discharged soldiers and sailors who served in the late war for the period of ninety days. Section 2306 enacts:

"Every person entitled, under the provisions of section 2304, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

The circular above referred to, or so much thereof as has relation to the question under consideration, provides :

"Where a party entitled desires to make an additional entry of a quantity which, with his original entry, shall not exceed one hundred and sixty acres, it is required that a full recital of military service be presented to this office, with due proof of the identity of the party making the claim, and with proper reference to his original homestead entry, giving the name of the district office, date and number of entry, and description of the land. In addition, a detailed statement, under oath, must be filed by the party in interest, setting forth the facts respecting his right to make the entry, and containing his declaration that he has not in any manner exercised his right, either by previous entry or application, or by sale, transfer, or power of attorney, but that the same remains in him unimpaired. He must also declare, under oath, that he has made full compliance with the homestead law in the matter of residence upon, cultivation and improvement of, his original homestead entry; and should further recite whether or not he has proved up his claim and received a patent of the land.

When these papers are filed and examined, they will, if found satisfactory, be returned with a certificate attached recognizing the right of the party to make additional entry under the law; and when presented with a proper application at any district land office, *either by the party entitled or his agent or attorney*, they will be accepted by the register and receiver, and forwarded with the entry papers to this office in the usual manner."

This Thomas entry was made under the following circumstances: The certificate of your office showing that Thomas was entitled to an additional homestead entry not exceeding eighty acres, as provided by the statute above quoted was issued under date of February 7, 1878. Prior to this general recognition of his right to an entry of this kind, Thomas, on January 1, 1878, appointed one D. H. Talbot, of Sioux City, Iowa, his attorney to obtain the examination and approval of his claim for an additional entry, and authorized the said Talbot to receive said certificate above mentioned, and to locate for him at any land office in the United States such lands as he should be entitled to enter. He further gave unto said attorney "full power of substitution, and to ask for and receive the patent for the land so located by my (his) additional right;" and also irrevocably invested him "with full power to perform everything whatsoever required and necessary to be done, as I (he) might or could do if personally present."

Under date of May 16, 1878, the said Talbot "substituted and appointed" one William H. Mead, of San Francisco, California, "to execute and perform the powers and trusts" granted by the power of attorney before mentioned.

Mead it appears located the land embraced in the Thomas entry, and filed all the necessary papers and exhibits in the San Francisco land office on the 8th of July, 1878.

Upon this state of facts it is insisted on behalf of Oliver that the Thomas entry is absolutely void, charging, first, That the power of attorney given by Talbot to Mead was in blank, the name of said Mead

having been inserted therein some time after it was signed and acknowledged by Talbot as aforesaid: Second, That the application to enter made and filed on behalf of Thomas July 8, 1878, was signed by Thomas in blank, no description of this or any other land having been inserted therein until some time after the signing thereof by Thomas, and that Thomas was not within the State of California on the day the entry was made in his name. A hearing is therefore asked by him to prove these allegations.

In so far as the matter of a hearing is concerned, it is sufficient to say, that it must be denied if the alleged facts, though proven, could be of no avail to Oliver.

Now, under the circular of instructions above mentioned, in force when the Thomas entry was made, the practice was to allow entries made under circumstances similar to those alleged on behalf of Oliver in relation to this entry. This practice is expressly sanctioned by Secretary Chandler in his letter to the Commissioner of the General Land Office dated March 10, 1877 (2 C. L. L., 478) which was the basis of the circular above mentioned. See also the cases of Calvin A. Allison (1 L. D., 61); Joshua Farmer (2 id., 31); William French (id., 237); Lamon Shaffer (id., 240).

The Thomas entry, therefore, having been made and allowed under the rulings then in force, and not being in conflict with the law as then interpreted should be allowed to stand. The entryman complied with all the regulations of the Department in the matter of his entry and he should not be prejudiced now, because those regulations have been changed. I Kent's Com., 476; *Brown v. United States* (113 U. S., 568, and cited cases).

This brings me to the consideration of Gomez's appeal. As already stated, the evidence shows that Oliver's settlement was made and his residence established upon the land embraced in the Thomas entry, in the fall of 1879, after the allowance of said entry, and that his main improvements are upon that tract.

Upon these facts the contention on the part of Gomez is, that Oliver's settlement, made upon land which was embraced in the Thomas entry, was unauthorized and void for all purposes.

I have been unable to discover any authority directly in point upon this question, but I am of opinion, that upon principle, the point raised by Gomez is well taken. The settlement of Oliver was made *not on public land*, but upon land which had been segregated from the public domain. Manifestly, then, he could acquire no rights to the tract upon which he settled. If he could acquire no rights under the pre-emption law to the tract upon which he settled, I am unable to discover what rights he can assert by virtue of such settlement to an adjoining tract occupying a different status. It has been repeatedly held by this Department that a settlement made on land covered by an entry is as against the government of no effect while such entry remains uncan-

ceeded. Likewise a settlement made upon a reservation is as against the government of no force or effect while such reservation is in existence. *Hosmer v. Wallace* (97 U. S., 575). But it is said that Oliver's settlement was for the entire quarter, that his *claim* was to that extent, and therefore that his settlement though made on land to which he could hope to acquire no right, was nevertheless good to the remaining part of *the same quarter*. Stated in general terms this proposition amounts to this: Any qualified pre-emptor may settle on a tract of patented land, knowing it to be such, and lay claim to such patented tract and an adjoining tract of public land under the pre-emption law; then make final proof for the *whole* tract, showing conclusively that he did not reside upon the public land, and have *that tract of public land* awarded to him under the pre-emption law. Such proposition is to my mind clearly untenable. It is quite true that a settlement made on any part of a quarter-section of *public land* may be considered to embrace the whole quarter; but that is not this case by any means. A settlement made on a tract of land segregated from the public domain, the settler knowing or bound to know that the land occupies such status, is, neither in law or in fact, any settlement at all. It is useless for all purposes.

Further, it is shown conclusively that Oliver's so-called settlement was not made until about sixteen months after his pre-emption declaratory statement was filed in the local office. This fact of itself tends somewhat to impeach his good faith. It is quite true that the defects in such filing might have been cured if settlement had afterwards been made prior to the intervention of an adverse claim, but in this case, as has been shown, there never was a settlement by Oliver on the W. $\frac{1}{2}$ of the quarter, such as the law contemplates, and his filing therefor is a nullity.

For the foregoing reasons that part of your said office decision which allows the Thomas entry to remain intact is affirmed, and that part holding the Gomez entry for cancellation is reversed.

It is proper to say in this connection that this conclusion is reached without reference to several affidavits—one by Bellina, and another by Oliver—which were filed after the case was closed at the land office, and have not, for that reason, been considered. See Rule 72.

PREFERENCE RIGHT OF ENTRY.

BACHMAN v. SMITH.

The relinquishment of the contestant's preference right of entry leaves the land open to the first legal application on cancellation of the entry.

Acting Secretary Muldrow to Commissioner Sparks, December 20, 1886.

I have considered the case of William H. Bachman v. Dorothy Smith, involving the preference right to enter the NE. $\frac{1}{4}$ of Sec. 29, T. 112 N., R. 63 W., Huron land district, Dakota.

Said tract was originally entered under the timber-culture act, by one George Morley, whose claim was contested by Bachman, and the entry canceled February 13, 1885. After the initiation of contest, but before the rendition of the decision by the local officers, Bachman offered in the open market his relinquishment to all his "right, title and interest" in the tract, and the same was purchased by Dorothy Smith, through her son and agent George I. Smith, she paying one hundred and twenty-five dollars in cash for the same. On receiving the relinquishment, Smith filed the same in the local land office.

Bachman's attorney, and through him Bachman, were duly notified of the cancellation of Morley's entry. Thereupon Bachman appealed at the local land office, March 23, 1885, to make timber-culture entry of the land; but his application was refused because Mrs. Dorothy Smith had made entry of the same March 17th. Bachman appealed to your office, which affirmed the action of the local officers. Thereupon Bachman appeals to this office.

Bachman contends (1) "That the said relinquishment was void because it was not filed in the land office by him or with his consent." (2) "That there is no provision of law for relinquishing a preference right of contest. (3) "That said document can not be construed as a relinquishment," because the number of the receiver's receipt is left blank—therefore he relinquishes nothing. (4) That he relinquished nothing, because he had no *entry* to relinquish, and there is no reference whatever made in the instrument to the relinquishment of a *preference right* of entry.

It is to be noted that Mrs. Smith claims nothing as against the United States by virtue of her purchase of Bachman's relinquishment, the \$125 paid him—and which he still retains—being simply in consideration of his promise to neglect and refrain from filing upon or making entry of the tract until she should have an opportunity to do so. When she had purchased and paid for the document, and received it into her hands, certainly no formal authority from him was necessary before filing it, without which filing it would have been useless to her. When he wrote "I hereby relinquish *all* my right, title and interest in and to" the tract described, the local officers were justified in interpreting this language to include his preference right of entry thereof—especially since this was the only right or interest of any kind he had in the tract. When he relinquished his right, title and interest in and to "the land described to wit, Sec. No. 29, T. 112, R. 63," the omission of the number of the receiver's receipt does not invalidate the instrument. I affirm your office decision, that the document filed, in the usual form of a relinquishment, was rightly considered a waiver of Bachman's preference right to enter the land. After the cancellation of the prior entry and the filing of that instrument, the land was open to entry by the earliest applicant.

APPROXIMATION ENTRY.

JOSEPH H. McCOMB.*

As settlement was made before survey, and valuable improvements placed on each subdivision, an exception is made to the present rule requiring an entry to approximate one hundred and sixty acres, as its enforcement herein would work irreparable injury to the entryman, who purchased under the former practice of the Department.

Secretary Lamar to Commissioner Sparks, April 20, 1886.

I have before me the appeal of Joseph H. McComb from your predecessor's decision of December 26, 1884, requiring him "to elect which of the legal subdivisions of his entry he will have canceled, so as to approximate as nearly as may be the area allowed by law."

McComb's entry is for the NE. $\frac{1}{4}$ of Sec. 1, T. 15 N., R. 60 W., Grand Forks, Dakota, and was made June 11, 1883. The S. $\frac{1}{2}$ of said quarter section is the usual 80-acre tract, and the N. $\frac{1}{2}$ is divided into lots 1 and 2, containing 53.57 and 53.67 acres respectively. The quarter section therefore contains 187.24 acres or 27.24 acres in excess of the ordinary quarter section.

The existing ruling, which was followed in the decision of your office, is founded on the departmental decision in *ex parte* Sayles (2 L. D., 88) and *ex parte* Wilkins (Id., 129). The former of these was made on September 17, 1883, and, therefore, after date of McComb's entry. Prior to said decision the departmental ruling had been that fractional quarter sections of any size could be covered by a single claim (*ex parte* Aanrud, 7 C. L. O., 103), and consequently McComb's entry when made was sanctioned by the rulings of the Department. His affidavit is in the record, showing that he settled on this quarter section, and had valuable improvements on all its subdivisions prior to survey, that he purchased it in good faith with knowledge of and relying upon the then existing ruling of the Department, that since said purchase he has made further valuable improvements on said subdivision, and that the Land Department will inflict irreparable injury on him by canceling his entry as to any part of the quarter section. This state of facts broadly distinguishes this case from that of Sayles and Wilkins as reported, and I am of opinion that McComb's entry should not now be disturbed.

Your predecessor's decision is therefore reversed.

RAILROAD GRANT—MAP OF GENERAL ROUTE.

MATTHEW STURM.

▲ statutory withdrawal of the odd-numbered sections within the forty miles limit followed the filing of the map of general route.

Acting Secretary Muldrow to Commissioner Sparks, December 18, 1886.

I have considered the case presented by the application of Matthew Sturm to make additional homestead entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of

* Omitted from 4 L. D.

Sec. 5, T. 7 N., R. 31 E., W. M., Walla Walla district, Washington Territory, on appeal by said Sturm from your office decision of November 10, 1883, rejecting said application.

The land in question lies within the limits of the grant by act of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company. The records of your office show that one Christopher McCannon made homestead entry No. 1222, for the entire NE. $\frac{1}{4}$ of said Sec. 5, August 3, 1870—which entry was canceled for abandonment January 29, 1872.

December 28, 1878, Matthew Sturm submitted final proof showing that he had settled upon the “N. $\frac{1}{2}$ ” of said NE. $\frac{1}{4}$ of Sec. 5, in March, 1872; had resided thereon continuously, was duly qualified to make homestead entry, had fully complied with all the demands of the homestead law, and had made improvements, valued at over two thousand dollars, upon said land.

March 19, 1883—more than four years after Sturm had submitted final proof, as above stated—the railroad company filed protest against the allowance of said entry. Having failed to appear in response to the citation issued preliminary to the making of final proof by Sturm, the company is in default and has no standing before the Department (*Atlantic & Pacific R. R. Co. v. Forrester*, 1 L. D., 482).

February 10, 1883, said Sturm made application for the “S. $\frac{1}{2}$ ” of the same (NE.) quarter of said section 5, as an additional homestead. The register and receiver, October 1, 1883, rejected said application. This rejection you affirm.

Upon the cancellation of McCannon's entry (January 29, 1872, *supra*), the tract which had previously been covered thereby reverted to and became a part of the public domain; and when the Northern Pacific Railroad Company subsequently filed its map of general route—which it did February 21, 1872—the tract in question became by law withdrawn for the benefit of said company. *Buttz v. Northern Pacific R. R. Co.* (119 U. S., 55).

For the reasons herein stated, I concur in the conclusion reached in your said office letter of November 10, 1883, and affirm your decision.

HOMESTEAD CONTEST—CONTESTANT.

WAZUZER *v.* KROPITZKY.

The contestant's motive in attacking the entry, or his want of qualification to enter, is not material to the entryman's defense.

Acting Secretary Muldrow to Commissioner Sparks, December 18, 1886.

I have considered the case of Nettie Wazuzer *v.* David Kropitzky, involving the SW. $\frac{1}{4}$ of Sec. 34, T. 1 N., R. 68 W., Denver district, Colorado.

Kropitzky made homestead entry for the tract described May 21, 1883. Contest was initiated December 3, 1884, on the allegation of failure to establish residence, and also abandonment, if residence was ever established. Hearing was had January 15, 1885. The local officers decided that claimant had abandoned the tract. Claimant appealed to your office, which affirmed the decision of the local officers. Claimant then appealed to the Department.

The testimony of the claimant and his witnesses is all that need be considered in the determination of this case. From this it appears that claimant and his wife went to the land a few days after entry (in May, 1883), and remained there four or five months, in what is called a "partnership tent," located so as to cover the corner of four quarter-sections, for the benefit of four entrymen. During that time he plowed three or four acres, from which he raised oats and potatoes. In September, 1883, he removed, with his family, to Denver. Four months later he went to the land, remained thereon for one night only; again in the spring of the next year (1884) for one night only; in July, 1884, he went to the tract with his wife, and remained eight days, sleeping on the tract two nights; in September of 1884, they again went to the land for "a few days." From the summer of 1883 till contest (December, 1884) claimant did nothing in the way of cultivating the tract. After claimant and his wife left the tract in the summer of 1883, until hearing, their continuous residence was Denver.

Claimant alleges three grounds of error:

(1) The contestant is a married woman, and not qualified to enter the land.

This is immaterial. "The right to contest an abandoned homestead entry does not rest upon the contestant's qualifications to enter the land, but may be exercised by *any one*" (Geisendorfer v. Jones, 4, L. D., 185).

(2) The contestant is a personal enemy, and did not make the contest in good faith, but for the purpose of gratifying a grudge.

This also is immaterial. There is nothing in the law or the regulations of the land department which provides that a contest shall be initiated only by the entryman's friends.

(3) That the land in controversy is arid and incapable of cultivation without irrigation, and claimant was waiting for the completion of an irrigating ditch.

Claimant made entry of the tract under the homestead law, and must be held to a compliance with the requirements of the homestead law.

I affirm your office decision of April 16, 1885.

HOMESTEAD—APPROXIMATION ENTRY.

ALEXANDER BOURET.

In view of the fact that settlement, with valuable improvements, was made long prior to survey, and that the entry, which was allowed, covers land so situated that the relinquishment of a portion thereof would be without value to the government, and of the small amount involved, an exception is made to the rule of approximation.

Acting Secretary Muldrow to Commissioner Sparks, December 18, 1886.

I have considered the appeal of Alexander Bouret from your office decisions of December 4, 1884, and February 2, 1885, rejecting his application to make homestead final entry for Lots 1, 2, 3, 4, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, T. 151 N., R. 65 W., Devil's Lake district, Dakota.

Bouret settled upon the land claimed by him November 4, 1875—more than eight years in advance of survey. Township map of survey was filed March 18, 1884. Bouret made homestead entry March 20, and final proof June 20, 1884, showing that he had resided on the land continuously since settlement.

When the survey was made, Bouret found that while his improvements did not cover more than one hundred and sixty acres, they were not all embraced within the limits of any one technical quarter-section; and that to include them he must make entry of the lots above described, aggregating 176 $\frac{1}{2}$ acres. He directed the attention of the local officers to the matter, and was allowed by them to make entry for that amount. He then still further improved all the lands embraced in said entry, continuing to do so until he made final proof. On forwarding his final proof to your office he was called upon, by letter of December 4, 1884, to elect which of said subdivisions he would relinquish from his claim. He asked for a reconsideration of the matter, but your office reaffirmed the same by letter of February 2, 1885.

Bouret makes affidavit that his improvements, the particulars of which he sets forth, are so situated that the enforcement of your decision will result in great loss to him. Before survey he had expended over a thousand dollars on the tract; and since the allowance of final entry by the local officers, relying upon their decision, he has placed on the land additional improvements to the amount of over another thousand dollars.

While the rule laid down in the case of Henry P. Sayles (2 L. D., 88) is the one which should be followed in all ordinary cases, it seems to me that the case at bar presents features which would justify its being made an exception, like that of Joseph H. McComb, decided by the Department April 26, 1886 (5 L. D.). In view of the small amount which the entry exceeds a technical quarter section; of the facts that Bouret settled and made valuable improvements upon the land claimed

by him long prior to survey; that the local land officers permitted him to make entry of the tract; that relying upon such permission and approval he made other costly improvements, after entry but prior to being directed by your office to relinquish a portion thereof; that the land is so situated that all the lots claimed by him naturally belong together by location and contiguity, while any single relinquished lot would be likely to be practically valueless to the government; that there is no way in which his entry can be readjusted so as to reduce it to an even one hundred and sixty acres, but that if compelled to relinquish anything he must suffer great hardship and loss—far beyond any advantage the government could gain—I reverse your decision, and direct that Bouret's entry be approved for the full amount claimed.

TIMBER CULTURE CONTEST—PRACTICE—EVIDENCE.

PRINCE v. WADSWORTH.

The admissibility of evidence is determined by the charge under investigation. The defense is entitled to show acts done in compliance with the law prior to the receipt of notice of the contest.

Acting Secretary Muldrow to Commissioner Sparks, December 20, 1886.

I have considered the case of Henry R. Prince v. Ezra C. Wadsworth, involving timber-culture entry made by the latter January 4, 1876, for the NW. $\frac{1}{4}$ of Sec. 24, T. 14 N., R. 9 W., Grand Island district, Nebraska.

Contest was instituted against this entry by said Prince June 20, 1881. Hearing was held August 15, 1881. The local officers decided in favor of contestant. Claimant appealed, and on April 4, 1882, your office affirmed said decision. From your office decision no appeal was taken, and May 8, 1883, you notified the local office that Wadsworth's entry was canceled. On the 17th of the same month Prince made timber-culture entry for said tract.

May 26, same year, you advised the local office that your office letter of May 8th had been written inadvertently, and that as Prince had not applied to enter the tract at the time of initiating contest, the case should have been dismissed; and your office accordingly directed the re-instatement of Wadsworth's entry, and held that of Prince for cancellation. From this decision Prince appealed to the Department. By decision of my predecessor, Mr. Secretary Teller (March 7, 1884), Prince was accorded the right to proceed with a second contest, "such right dating from the time when he filed his application to enter." But the first step in such proceeding, without which jurisdiction could not be acquired, would be notice to the defendant; and it was competent for defendant to introduce evidence tending to show compliance with law prior to notice of (the second) contest.

It may be conceded that the claimant had not fully complied with the law prior to the re instatement of his entry; but the allegation of

the complaint, of date May 3, 1884, being that claimant had "totally failed to comply with the law, to this extent, that there are *now* no trees nor cuttings growing on the land," the contestant is bound by that allegation, and it was competent for defendant to introduce evidence relative thereto.

The evidence shows that defendant, after re-instatement of his entry (May 26, 1883), and before the initiation of the second contest, had planted over ten acres of trees, of which, by actual count, over eight thousand four hundred were living and growing when said second contest was initiated.

For the reasons herein given, I reverse said office decision of July 16, 1885, holding Wadsworth's entry for cancellation, and direct that it be again re-instated.

SWAMP LANDS—CERTIFICATION.

STATE OF OREGON.

While the certification of lands as swamp will not be disturbed to correct errors in adjudication, the government will not be concluded if its action was procured through fraud or mistake.

Acting Secretary Muldrow to Hon. Z. F. Moody, governor of Oregon, December 22, 1886.

I am in receipt of your communication of the 16th ultimo, enclosing a copy of a letter from Mr. Charles Shackleford, special agent of the General Land Office, in reference to swamp lands certified to the State of Oregon, embraced in what is known as list No. 5, which I have referred to the Commissioner of the General Land Office, for report thereon.

In reference to your complaint that the special agent, instead of making an examination of lands selected by the State and not acted upon by this Department, is dealing with matters entirely foreign to his instructions, and proposes a procedure entirely at variance with my letter of August 7, 1886 (5 L. D. 31), I have to reply that the action of the special agent in making an examination of the character of the lands embraced in list No. 5, and in investigating the conduct of the former special agent is authorized by my letter of August 7, 1886, which fully appears from that part of the letter quoted in your communication, as follows: "As to the lands reported as not swamp and overflowed, it has been decided by the Department that the State is estopped from further examination of said lands, and can not now be heard to show that such lands are swamp and overflowed, and that the government and all other parties are equally estopped from investigation of the character of the lands reported by said Commission as swamp and overflowed, and which have been approved and certified as inuring to the State under the swamp land grant, *unless fraud or mistake be shown.*"

While it is apparent from the above quoted extract that no further investigation of the lands so certified should be allowed for the purpose of correcting a mere error of adjudication, it was distinctly held that the government would not be concluded, if it was shown that the certification and approval of said list was obtained by fraud or mistake.

When this matter came before me last for consideration, it was alleged that the approval and certification of this list was obtained through the fraudulent conduct of the special agent of the government charged with the duty of making an examination of these lands and reporting them for approval or disapproval to the Department. It was for the purpose of determining whether evidence existed to support this charge that the recent investigation of the special agent was ordered, and to this end it was directed.

This charge has again been brought to my attention in such a manner as to put the Department upon inquiry. Since the receipt of your letter of the 16th instant, I have received a letter from Captain John Mullan, agent for the State of Oregon, directing my attention to this subject, and with reference to your letter requesting that, if any report or allegation has been filed in the Department tending to impeach, discredit, or cast a cloud upon the title to the lands embraced in list No. 5, or to delay the issuance of patent therefor, he may be permitted to examine the same before any final recommendation or action is had thereon.

In reply thereto, I state that if after a careful examination I shall conclude that there is sufficient in the charge to warrant action in the premises, calling upon the State to show cause why the approval and certification of said selections embraced in list No. 5 should not be revoked and canceled, Captain Mullan, or any other authorized agent of the State, will be permitted to inspect all papers on file in the Department relating to the charge and will have full and ample opportunity to answer and defend the same.

I have directed that a copy of this letter be furnished to Captain Mullan, the agent for the State of Oregon.

RIGHT OF PURCHASE UNDER ACT OF JUNE 15, 1880.

WILLIAM H. BIZZELL.

Jurisdiction to consider an application under the act of June 15, 1880, to purchase land for which patent has issued, may be conferred upon the Land Department by the surrender of said patent, where the entry falls within the terms of the statute.

The case of Thorp Williams *et al.* cited and distinguished.

Acting Secretary Muldrow to Commissioner Sparks, December 23, 1886.

I return herewith the letter of United States District Attorney House, of March 2, 1886, relative to the homestead entry of William H. Biz-

zell, which was referred to me by your letter of November 6, 1886. This letter was referred to the Commissioner of the General Land Office, who has made report and recommendation thereon, which I also transmit herewith.

From an examination of the files of the General Land Office it appears that the entry was made April 17, 1875; final certificate issued thereon September 20, 1880; and the land was patented September 9, 1882.

A bill has been filed to cancel said entry upon the ground that Bizzell never lived on the land as required by the statute. Since the filing of said bill, the heirs of Bizzell, through the administrator of his estate, have made a proposition to purchase said land at \$2.50 per acre, and to pay all costs.

The Commissioner recommends that said proposition be not accepted, stating that he knows no authority of law which would permit the purchase of the land under the circumstances of the case, and that there is no equity in the case that would justify the perfection of title in the heirs of Bizzell, if it could be done.

It was held by the Department in the case of Thorp Williams *et al.*, (2 L. D., 114,) that lands entered and patented under the general homestead law are not subject to purchase by the same parties under the act of June 15, 1880. In that case, however, the land was patented prior to the act of June 15, 1880, and at the passage of that act title had passed out of the government; hence lands in that condition were not contemplated by the act. But the entry of Bizzell having been made prior to the act of June 15, 1880, and final proof not having been made at the date of its passage, his entry was of the class contemplated by the act, and hence he could have purchased under it at any time prior to patent. The question now arises whether the issuance of patent abridged or impaired that right.

It is true that while the patent is outstanding the Land Department has no jurisdiction in the premises. But I can see no reason why the Land Department may not be again invested with jurisdiction in the matter by a voluntary relinquishment and surrender of the patent by the administrator or heirs of Bizzell. In that event the Commissioner would, in my opinion, have as full and complete jurisdiction and authority to consider an application to purchase under the act of June 15, 1880, as if the patent had not issued, although he would have no jurisdiction over the land while the patent remained outstanding.

As the entry in its present status is not subject to the jurisdiction of the Department, I do not intend to be understood by this as making any decision in the matter, or to indicate what might be the action of the Department in this case in the event that the proper parties should determine to voluntarily surrender the patent, and afterward make application to purchase under the act of June 15, 1880.

TIMBER CULTURE ENTRY—NATURAL GROWTH.

ALBERT H. SADLER.

Land rendered "devoid of timber" by the removal of a natural growth is not subject to timber culture entry.

Acting Secretary Muldrow to Commissioner Sparks, December 23, 1886.

I am in receipt of the papers in the case of the appeal of Albert H. Sadler from the rejection, by your office letter of May 23, 1885, of his application to make timber-culture entry for the NW. $\frac{1}{4}$ of Sec. 30, T. 5, R. 21, Kirwin district, Kansas.

Sadler, in his application, states that said section 30 is *now* utterly devoid of timber. His affidavit further states:

That there was originally some timber on said section, but that the same has all been cut, and that there are only the stumps of trees left, leaving said section utterly devoid of timber, as above stated.

This case is ruled by that of my predecessor, Mr. Secretary Teller, in the case of *Sellman v. Redding* (2 L. D., 270,) wherein it was said:

If the tract at any time was not subject to entry on account of the natural growth of timber on that section, the act of removing the timber would not bring the land under the provisions of the timber-culture laws. It is to be presumed that, if left to itself, the section would again produce timber without artificial cultivation.

I therefore affirm your said office decision rejecting Sadler's application.

OSAGE INDIAN LANDS—ACT OF MAY 28, 1880.

UNITED STATES *v.* WOODBURY *et al.*

The statutory oath required of a pre-emptor is not applicable to an entry under the act of May 28, 1880.

By this act the only condition pre-requisite to an entry of these lands is that the purchaser shall be an actual settler with the qualifications of a pre-emptor.

The case of *Morgan v. Craig* overruled.

Acting Secretary Muldrow to Commissioner Sparks, December 23, 1886.

This case involves the validity of Osage Cash Entry No. 52, made by Charles H. Robey, September 12, 1884, for the NE. $\frac{1}{4}$ of Sec. 12, T. 33 S., R. 23 W., Garden City, Kansas, under the act of May 28, 1880. You held this entry for cancellation upon the ground that Robey had made repeated efforts to dispose of his claim before making final proof, showing that he was not a bona-fide pre-emptor, and that his entry was made for a speculative purpose.

From this decision Robey appealed, alleging as error, (1), In holding that Robey settled upon and improved the land for the purpose of speculation, and (2) In holding that said entry was subject to the

provisions of the general pre-emption laws. These are the controlling issues in the case.

The tract in question is part of the Osage Indian trust and diminished reserve lands, in Kansas, which are subject to disposal under the act of May 28, 1880 (21 Stat., 143). In July, 1883, this tract was in possession of Robert C. Lowry, who never made any claim to it. About this time Robey, having the qualifications of a pre-emptor, went upon the land and resided with Lowry as a boarder, but supposing that Lowry was qualified to take the land as a pre-emptor, and desiring to secure land near to the tract that Lowry was living on, selected land in a different quarter section upon which he procured some plowing to be done. Robey made no filing for this tract, nor any settlement upon it, but, with Lowry's permission, erected on the land in controversy a small house, in which he opened a store and sold goods to passing travelers.

Robey subsequently discovered that Lowry was a mere squatter, and not qualified to pre-empt the land, whereupon, on April 26, 1884, he filed declaratory statement for the tract, alleging settlement December 25, 1883. In the spring or summer of 1884 his own improvements consisted of a house for residence, an out house and a well of water, he had some land broken, and after filing purchased the improvements of Lowry.

On June 13, 1884, Robey signed an agreement to convey to James M. Young and T. M. Carter, for the Marian Townsite Company, this tract of land, in consideration of \$600, to be paid in cash when he should prove up and be able to give a deed, reserving to himself a good residence and building lot on said tract. There is evidence in the record showing that Robey was drunk when he executed this agreement, and on recovering from a drunken stupor and being told what he had done and that his act was illegal, he destroyed his copy of the agreement, and wrote to the parties repudiating the contract.

Afterwards and before Robey made final proof, W. P. Brush proposed to Robey to furnish a printing press valued at \$600, to bring in a third party who would furnish a capital of \$600, that Robey should prove up, and each were to receive one-third interest in the tract. Robey considered this proposition, although there was no contract or agreement made, nor was any further action had in regard to it, until after final proof, when the proposition seems to have been rejected. Robey made final proof September 12, 1884, and receipt No. 52 for the cash payment was issued to him.

On October 14, thereafter, Robey sold said land to J. A. Cooper, as agent for the Ashland Townsite Company, and the town of Ashland was thereupon located upon the tract. The company appears to be a bona-fide purchaser without notice.

October 28, 1884, Norval Dudley filed protest against the issuance of patent to Robey, upon the ground that said entry was made under a

written contract whereby the title would inure to the Marian Townsite Company, upon which a hearing was ordered to determine the character of said entry.

Said hearing developed the facts substantially as above stated, upon which the register and receiver delivered a joint opinion recommending the cancellation of the entry, which decision you affirmed, upon the ground heretofore stated. From said decision Charles P. Woodbury, administrator of the estate of Robey (he having died since the hearing), filed this appeal. Counsel for Robey contend that the contract made with the Marian Townsite Company could not possibly have caused title to inure to their benefit, because it was based upon a condition of acceptance by the company, which was not accepted, but was afterwards repudiated; and that there was no agreement made with Brush, either with or without a consideration, that was ever attempted to be executed.

I do not consider it necessary to determine whether the alleged contract made by Robey could be enforced or not, nor what would be the effect of such a contract upon an entry made under the pre-emption laws, because I do not consider that the oath required to be taken by an entryman under the pre-emption law is applicable to entries made under the act of May 28, 1880, and hence the case may be disposed of under the second ground of error.

The second ground of error alleged is, "In holding that this entry is subject to the provisions of the general pre-emption law."

The sale of the Osage Indian trust and diminished reserve lands was first provided for by the joint resolution of Congress of April 10, 1869, (16 Stat., 55,) which provided—

"That any bona-fide settler residing upon any portion of the lands sold to the United States by virtue of the treaty between the United States and the Great and Little Osage tribe of Indians, who is a citizen of the United States, or who shall have declared his intention to become a citizen of the United States, shall be entitled to purchase the same in quantity not exceeding one hundred and sixty acres, at the price of \$1.25 per acre, within two years from the passage of the act, under such rules as may be prescribed by the Secretary of the Interior."

This was subsequently re-enacted by the act of July 15, 1870, (16 Stat., 362), but provided that payment should be made within one year from date of settlement.

The construction of the act of July 15, 1870, came before the supreme court of Kansas in the case of *Foster v. Brost* (11 Kan., 350,) in which the court held that the claimant's right to purchase said land is not determined by the pre-emption law, but by the act of July 15, 1870, and that he had a perfect right before purchasing the tract from the government to make a contract to convey a portion of the same, or all of it, without forfeiting his right to purchase it.

Subsequently the act of May 9, 1872, (17 Stat., 90,) was passed, which was afterwards incorporated in the Revised Statutes as Section 2283. That section, which is in the exact language of the act, reads as follows :

"The Osage Indian trust and diminished reserved lands in the State of Kansas, except the sixteenth and thirty-sixth sections, shall be subject to disposal for cash only to actual settlers, in quantities not exceeding one hundred and sixty acres, or one-quarter section to each in compact form, *in accordance with the general principles of the pre-emption laws*, under the direction of the Commissioner of the General Land Office; but claimants shall file their declaratory statements as prescribed in other cases upon unoffered lands, and shall pay for the tracts respectively settled upon within one year from date of settlement where the plat of survey is on file at that date, and within one year from the filing of the township plat in the district office, where such plat is not on file at date of settlement."

It would seem from this act that Congress intended that all entries of Osage Indian lands should be governed by the general pre-emption laws in every respect, and such was the practice of the Department under that act. This act continued of force until the passage of the act of August 11, 1876, (19 Stat., 127), which provided—

"That any bona-fide settler, residing at the time of completing his entry (upon said lands), and being a citizen of the United States, or who had declared his intention to become a citizen, shall be and is hereby entitled to purchase the same in quantity not to exceed one hundred and sixty acres at the price of one dollar and twenty-five cents per acre, within one year from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior, on the terms hereinafter provided."

The terms provided are that the claimant shall pay one-fourth cash at the time of entry and the balance in three annual payments, with interest, at the rate of five per cent. per annum, and that if he failed to make entry within twelve months from the passage of the act, he should forfeit all right to the land, except in cases where the land was in contest.

It is not clear whether this act was intended as a repeal of the act of May 9, 1872, or simply an act for the relief of claimants who settled under the act of May 9, 1872, by allowing them to cure their default, and by extending the time of payment limited by that act and providing for more liberal terms of payment.

This act was considered by Secretary Schurz in the case of Storrs v. Gifford (6 C. L. O., 128), in which case claimant had made a contract to secure another party for money due by mortgage or deed of trust to be executed after obtaining title to the land. The Commissioner ruled adversely to the claim, upon the theory that the same rule in all respects must govern in the disposition of the Osage Ceded Lands which obtain in the disposition of the public lands under the pre-emption law.

The Secretary, after stating this ruling, says: "In this I think you err." Then, after reciting the oath required of the pre-emptor as prescribed in Section 2262, R. S., says:

"There is no such provision in the act of August 11, 1876, providing for the disposition of the Osage Ceded Lands. It is true that where

parties settle as did the parties in this case, they are required to file their declaratory statements within twenty days after the settlement, and make payment under the provisions of the act within one year. So far the act is in some respects similar to the pre-emption law, yet the prohibitions of the pre-emption law are not found in the act."

The question again came before the Department in the case of Elias Brechbill (10 C. L. O., 262). In this case Brechbill, being qualified, settled in 1870 and was killed in 1875 without having made application to purchase under the joint resolution of 1869. His administrator was allowed by the local officers to make cash entry under the act of August 11, 1876.

It was contended on the part of claimant that the joint resolution of 1869 conferred on Brechbill a pre-emption right, and, although he failed to purchase within the two years as therein provided, that the act of August 11, 1876, validated and confirmed said pre-emption right, and that the right of purchase rested in his administrator or heirs under Section 2269 of the Revised Statutes.

To this Secretary Teller replied, "This Department has never held that the pre-emption laws were extended over the Osage Ceded Lands by either of the aforesaid acts, consequently Section 2269 of the Revised Statutes has no application to the case at bar," citing *Foster v. Brost* to the effect that the pre-emption laws have no application to rights acquired under the act of 1870.

It will be observed that no reference is made to the act of 1872, but the act of 1876 was construed as not conferring upon settlers on Osage Indian lands the rights of pre-emptors, and hence could not have imposed on them by implication its requirements, and in this respect it was similar to the act of 1870.

It would seem as if Secretary Teller construed the act of August 11, 1876, as practically repealing the act of May 9, 1872.

But whether the act of 1876 be construed as a repeal of the act of 1872 or not it is very clear that the act of May 28, 1880, was not only intended to relieve actual settlers who had settled under pre-existing laws from a further compliance with and from the penalty of forfeiture by reason of a failure to comply with the requirements of pre-existing laws, but also to provide for the qualification and requirement of those who might thereafter settle upon said lands without reference to pre-existing laws. The act of May 28, 1880, as expressed in the title is "for the relief of settlers upon the Osage trust and diminished reserve lands in Kansas and for other purposes."

The first section of the act provides:

"That all actual settlers under *existing laws* upon the Osage Indian trust and diminished reserve lands in Kansas (any failure to comply with such existing laws notwithstanding) shall be allowed sixty days, after a day to be fixed by public notice by advertisement in two newspapers in each of the proper land districts, which day shall not be later than ninety days after the passage of this act, within which to make

proof of their claims, and to pay one-fourth of the purchase price thereof, and the said parties shall pay the balance of said purchase price in three annual installments thereafter; *Provided*, That nothing herein contained shall be construed to prevent an earlier payment of the whole or any installment of said purchase money as aforesaid."

The balance of said section then provides for the public sale of land, in the event that default in payment be made.

If, under pre-existing laws, the settler was required to comply in all respects with the general pre-emption laws, it is very plain that by the first section of the act of May 28, 1880, all settlers, who had made settlement under pre-existing laws, were relieved from further compliance with said laws, and the penalty of forfeiture by reason of a failure to comply with them, and I think it equally clear that the second section of said act did not intend to impose on persons who might thereafter settle upon said lands the requirements of the pre-emption laws, but simply that they should make proof of actual settlement and qualification, otherwise there would have been no purpose in making provision for future entries by the act of 1880, as the act of 1872 provided that such entries should be made in accordance with the principles of the general pre-emption laws, and the act of 1876 provided for the cash and annual payments in the same manner as provided for by the act of 1880.

The second section of said act is as follows:

"That all the said Indian lands remaining unsold and unappropriated, and not embraced in the claims provided for by section one of this act, shall be subject to disposal to *actual settlers only having the qualifications of pre-emptors*. Such settlers shall make due application to the register *with proof of settlement* and qualifications as aforesaid, and upon payment of not less than one-fourth the purchase price, shall be permitted to enter not exceeding one-quarter section each, the balance to be paid in three equal installments, with like penalties, liabilities, and restrictions, as to default and forfeiture as provided in section one of this act."

The third section then provides that all lands, including those mentioned in both the first and second sections upon which default has continued for ninety days, shall be placed on a list and the Secretary shall cause them to be proclaimed for sale in the manner prescribed for the offering of the public lands, after advertising the same for thirty days, and unless the purchase price be fully paid before the day of sale they shall be sold to the highest bidder at not less than the price fixed by law. It then provides that any of said lands remaining unsold after the offering as aforesaid shall be subject to private cash entry.

The fourth section then provides that, after payment of the first installment, the land shall be subject to taxation according to the laws of Kansas, and that if default be made in any installment of the purchase price, the purchaser at a tax sale, or his legal representative, may, after such default has become final, pay so much of the purchase price as remains unpaid, and receive patent for said land.

Considering the second section of this act in connection with the third and fourth sections, it seems that Congress intended that these lands should be purchased as other lands at private cash entry, the only difference being that preference is given before offering to an actual settler having the qualifications of a pre-emptor, and without reference to other requirements of the pre-emption laws.

This seems also to have been the construction given to this act by the Land Department at the time of its passage, because under instructions of June 28, 1880, issued to the register and receiver at Wichita, Kansas, the Commissioner, referring to section two of said act, says:

"Claimants under this section must have the qualifications of a pre-emptor under existing laws, and will be required to file their respective claims in your office with proof of settlement and qualification, and pay not less than one-fourth of the purchase price *within three months from date of settlement*, the balance of the purchase price to be paid as provided in section one of the act with like penalties," etc.

It will be seen from these instructions that the Land Office did not even require residence for six months as proof of actual settlement, as required by the regulations under the pre-emption laws, nor for any period, but simply that payment should be made within three months from day of settlement. But in June 28, 1881, the Commissioner issued instructions to the same local officers, in which, referring to said instructions of June 28, 1880, he says:

"I have now to inform you that my said instructions have, with the consent of the Hon. Secretary of the Interior, been so amended as to require that in entries hereafter made under section two, the general principles of the pre-emption law in respect to filing, proof of settlement, and notice of making proof, will be required to be followed, and that filings must be made within three months from date of settlement and proof, and payment of not less than one-fourth of the purchase price within six months from date of filing, with notice by publication as required in other pre-emption entries; and that a residence of not less than six months should be required to be shown, as evidence that the settlement is made in good faith."

While under these instructions the settler was only required to conform to the general principles of the pre-emption laws in respect to filing, proof of settlement, notice of making proof, and term of settlement, it was held by the Department in the case of *Morgan v. Craig* (10 C. L. O., 234), that a comparison of said act with that of May 9, 1872, and other acts relating to the disposal of these lands, shows that it was the policy of Congress to subject entries upon these lands to all the requirements and conditions of the general pre-emption laws.

In this case it appeared that Craig's settlement was made with the intention of proving up for the benefit of another, to whom he had agreed to convey the land after entry. The Commissioner held that "the mere fact that such an agreement may have existed is insufficient to debar him the right of entry, when he swears that no such contract now exists." The Department, however, reversed the ruling of the

land office, upon the ground above stated, and in support of this view the Secretary says:

"Bona-fides in settlement is an original and fundamental principle of the pre-emption law, and an actual settler is one who goes upon the land *animo manendi*, or, as the court remarks in *Lytle v. Arkansas* (22 How., 193), for the purpose of seeking a home."

But the pre-emption law requires that before a party makes entry he shall swear that he made his entry to appropriate it to his own *exclusive* use, and that he has not made any contract whereby the title, which he might obtain from the government, will inure to the benefit of another. There is no such requirement under the act of 1880 providing for the disposal of the Osage Ceded Lands. If the act of July 15, 1870, did not require that entries of the Osage Ceded Lands should be governed by the general pre-emption law, as determined by the court in the case of *Foster v. Brost*, (2 Kan., 350,) and by the Department in the cases of *Storrs v. Gifford*, (10 C. L. O., 128) and *Elias Brechbill* (10 C. L. O., 262) a comparison of that act with the act of May 28, 1880, clearly shows that no such requirement was provided by the latter act. I am therefore disposed to deny the correctness of the ruling in the case of *Morgan v. Craig*, and hence it is overruled. I am of the opinion that under the act of May 28, 1880, the only qualification and condition required to authorize an entry upon the Osage Indian trust and diminished reserve lands is, that the claimant must be an actual settler on the land at the date of entry, and must have the qualifications of a pre-emptor.

In the case of *Abraham L. Burke* (4 L. D., 340), it was held by the Department, that "to secure the right to purchase these lands, compliance with the requirements of the pre-emption laws with respect to settlement and residence must be shown." It will be observed, however, that this ruling was put upon the ground that Burke's entry was made under section 2283 of the Revised Statutes, which requires that such entries shall be made "in accordance with the general provisions of the pre-emption laws," and no reference to the act of May 28, 1880, was made, nor was the attention of the Department called to it, although it appears from the decision that Burke's entry was made in 1883. An examination of that case shows that Burke never made actual settlement, and it is upon this ground that his entry was canceled.

That Robey was an actual settler within the meaning of this act, and that he had the qualifications of a pre-emptor, can not be questioned. He had settled upon, built a house, and otherwise improved said tract for more than six months before final proof, and in fact was living on the tract for a much longer period. In the contract made with the Marian Townsite Company he reserved one lot for a home and another for a place of business, showing his intention to continue his residence on the tract.

He also had the qualifications of a pre emptor at the date of his entry. Simply improving another tract upon which he never settled or filed did not exhaust his pre-emption right.

I accordingly reverse your decision, and direct that patent be issued.

SANTEE SIOUX INDIAN RESERVATION.

LOUIS EGGERT.

The reservation was not open to entry until the approved list of Indian allotments was received at the local land office.

Acting Secretary Muldrow to Commissioner Sparks, December 24, 1886.

I am in receipt of your letter of November 27, 1885, transmitting the appeal of Louis Eggert from your office decision of July 15, 1885, affirming the action of the local officers in rejecting his application to make timber-culture entry for the NE. $\frac{1}{4}$ of Sec. 31, T. 31 N., R. 4 W., Niobrara district, Nebraska.

The tract described is within the limits of the Santee Sioux Indian reservation, which by executive order of February 9, 1885, was directed to be opened to settlement on and after May 15, 1885, excepting such tracts as might be selected by and allotted to individual Indians belonging to that tribe prior to April 15, 1885. The list of such selections and allotments was forwarded by the local officers to the President of the United States for his approval, but upon being returned, after approval, did not reach the local office until May 19, 1885; hence until that date the local officers had no means of knowing what tracts were or were not open to entry or filing. Eggert's application to make timber-culture entry was presented at the Niobrara land office on May 15, 1885, at 11.30 a. m., and refused for the reason above set forth. Eggert appealed to your office, and from your adverse decision to the Department. I affirm your decision.

RAILROAD GRANT—WHEN EFFECTIVE.

CENTNER v. NORTHERN PAC. R. R. CO.

Odd-numbered sections within the primary limits of the grant, which were vacant and unappropriated at the definite location of the road, passed to the company, although such lands at the date of the grant may have been otherwise appropriated.

Acting Secretary Muldrow to Commissioner Sparks, December 27, 1886.

This controversy relates to the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 29, T. 19 N., R. 2 W., Olympia, Washington Territory, and comes here on appeal by the

Northern Pacific Railroad Company from your decision, dated May 19, 1885, rejecting its claim to the tract specified.

This land is within the primary limits of the grant to the appellant company—main line—by the act of Congress approved July 2, 1864 (13 Stat., 365), as amended by the Joint Resolution of May 31, 1870 (16 id., 378). The withdrawal upon map of general route became effective in this district August 13, 1870, and the road was definitely located opposite this land May 14, 1874.

The records show that this tract was included in homestead entry No. 631 made by John Sexton November 28, 1866, and canceled April 7, 1874.

On the 20th of May, 1884, Charles A. Centner applied to make homestead entry of this tract with other lands. The railroad company was notified and on June 30th following filed objections to the allowance of this entry. July 1st ensuing the local office rejected Centner's application and he thereupon appealed. You reversed this decision and awarded the tract to Centner, subject to appeal. Your decision went upon the theory that inasmuch as at the date of the grant, as extended by the Joint Resolution of 1870, this tract was appropriated by the homestead entry of Sexton, it was excepted from such grant, though at the definite location of the road said tract was vacant and unappropriated.

The grant to this company by the third section of the act of 1864 is as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line . . . through the territories . . . and ten alternate sections of land per mile on each side of said railroad, whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office," etc.

It will be observed that this grant is in substantially the same language as that to the Central Pacific Railroad Company (13 Stat., 356), which was under consideration and construction in the case of *Thomas Rees v. Central Pacific Railroad Company* (5 L. D., 62; same case on review, 277), wherein it was held that the odd numbered sections within the primary limits of the grant, which were vacant and unappropriated at the definite location of the road, passed to the company, although at the date of the grant such lands may have been otherwise appropriated. The decision in that case would seem to govern in this, and upon authority of the same your decision is reversed.

TIMBER CULTURE—FRAUDULENT ENTRY.

GILBERT E. READ.

No fixed rule can be formulated by which to determine just what shall constitute an entry fraudulent or speculative. If the entryman has fully complied with the law as to breaking, cultivation, and planting, his entry should not be canceled, unless clearly shown by the evidence to be illegal.

Acting Secretary Muldrow to Commissioner Sparks, December 27, 1886.

I have considered the case of the United States *v.* Gilbert E. Read, as presented by the appeal of the latter from the decision of your office, dated May 7, 1885, refusing to rescind its former order cancelling his timber culture entry of the SW. $\frac{1}{4}$ of Sec. 9, T. 105, N., R. 59, W., 5th P. M., made at the Mitchell land office, Dakota Territory, on April 21, 1883.

It is shown by the record that Amelia E. Truax made timber culture entry of said tract at the Sioux Falls land office, in said Territory, on April 7, 1880. Read initiated a contest against said entry, and upon his procurement it was canceled, and his entry allowed.

On September 22, 1883, a special agent of your office transmitted the joint *ex parte* affidavits of Charles B. Brown, R. M. Church and C. L. Stratton, alleging that Read's entry was made for speculative purposes, and he recommended that it be canceled "by the most summary proceeding known to your office."

Thereupon your office, on December 26, 1883, canceled said entry and directed the district land officers to hold the land subject to entry by the first legal applicant. On January 8, 1884, the local land officers forwarded the application of Read for a reconsideration of said decision, who alleged if an opportunity was given he would show that said affidavits attacking his entry were false in every material respect. On January 18, 1884, your office granted said application and ordered a hearing, and directed the local land officers to consult with said special agent as to the time and place, in order that he might be present and represent the interests of the government.

The hearing was duly held, and upon the testimony submitted the district land officers held that the charge of speculation had not been sustained, and that said entry ought not to be canceled. On May 7, 1885, your office considered the case, and declined to rescind its former order of cancellation.

It is clear that said entry should not have been canceled in the first instance without a hearing. The *Le Cocq* cases (2 L. D., 784); *Franklin L. Bush et al.* (*ibid.*, 788). The burden of proof is upon the attacking party. *George T. Burr* (4 L. D., 65); *Andrew J. Healey* (*ibid.*, 81).

At said hearing Brown, by his attorney, insisted that the hearing having been ordered by your office, the burden of proof was upon Read, and he (Brown) utterly refused to pay the costs of said contest, or to

be considered a contestant of said entry. It is evident that Brown's entry should not have been allowed. Prior to the allowance thereof, Read had filed said application for re-instatement, which reserved the land until the same had been finally adjudicated. *Sarah Renner* (2 L. D., 43); *Johnson v. Gjevre* (3 L. D., 156); *Millis v. Burge* (4 L. D., 446).

Your office, however, refused to concur in the recommendation of the register and receiver, for the reason that Read's timber culture affidavit, executed October 10, 1882, was a matter of record in your office when he admits having offered his preference right of entry for sale, and also that it was his purpose to obtain indirectly the benefit of two entries under the timber culture law. Mr. Read stated in his testimony on cross-examination, in reply to the following question: "State whether or not during April, 1883, you offered to sell him this tract in question, together with the homestead on NW. $\frac{1}{4}$ of 9, 105, 59?"—

"Mr. Parsons called on me at Hitchcock's office, I think in April 12, 1883, previous to the entry; said he wanted to purchase that timber culture; at first I declined to sell. I supposed I had nothing to sell. I only had a contest. He urged me to fix a price. I finally made a proposition what I would sell all my interest for in 105-59. He said to me that he would think of it and let me know. I followed him out after a short time and told him I wouldn't sell, and withdrew my offer."

On his re-direct examination, when asked to state what idea he had concerning this claim and its sale just before entry, he stated—

"My idea was that I would save my timber culture right, and could purchase another claim, and that was what influenced me to make a proposition to Mr. Parsons."

It was held by this Department in the case of *Sims v. Busse et al.* (4 L. D., 369), that "it is not sufficient to allege in the contest affidavit that the entryman has repeatedly offered said land for sale to different persons, and that the same is now and has been held solely for speculation. Such an allegation does not necessarily contradict the affidavit required by the statute. *Non constat* that the applicant did not make the affidavit honestly and afterwards by reason of change of circumstances wish to dispose of his improvements and interest in the claim."

It was also held in said case, if the allegation is made that the entry was not made in good faith, but for the purpose of sale and speculation, the contestant may set out the fact that the entryman had repeatedly offered his claim for sale, as an inducement to said allegation, and proof of that fact would be evidence proper to consider in support of the allegation that the entry was fraudulent in its inception.

Said decision of your office concedes the fact that the evidence does not show that Read entered into any contract for the sale of his claim. The affidavit was filed October 10, 1882, and the conversation with Parsons was in April, 1883. It does not, therefore, follow that Read's contest against the prior entry was not initiated in good faith, or that his entry, made long subsequently, was for speculation.

While the entryman is required by the second section of said act to make an affidavit (among other things), "that I have made the said application in good faith, and not for the purpose of speculation that I intend to hold and cultivate the land," yet it was not the purpose of said act to inhibit the sale of the land after the entryman shall have complied with the law and completed his entry.

In the pre-emption laws (Sec. 2262, R. S.) the applicant is required to make oath that "he has not settled upon and improved such land to sell the same on speculation; but in good faith to appropriate it to his own exclusive use."

The supreme court of the United States, in the case of *Myers v. Croft* (13 Wall., 291), held that the entryman who had complied with the law in good faith had a right to sell the land covered by his entry.

No fixed rule can be formulated to determine just what shall render an entry fraudulent or speculative. If the entryman has fully complied with the law as to breaking, cultivation and the planting of trees, his entry should not be canceled, unless the evidence shows that the entry is illegal. *Perry on Trusts*, Sec. 169.

The register and receiver, with the witnesses before them, found that the evidence was not sufficient to show that said entry was made for speculation. The claimant positively denies under oath that said entry was made for that purpose, and it is not denied that he has fully complied with the law as to breaking and cultivation. The testimony tending to sustain the charge is indefinite, uncertain and not sufficient to overcome the positive denial of the claimant. *Root v. Shields* (1 Woolworth, 183).

For the reasons above stated, it is considered that the decision appealed from is erroneous, and it is therefore reversed.

TIMBER CULTURE CONTEST—EVIDENCE.

FARNSWORTH v. HUDSON.

Acts performed in compliance with the law, after the affidavit of contest was filed, but before notice was served, are proper subjects of evidence.

Acting Secretary Muldrow to Commissioner Sparks, December 27, 1886.

I have considered the case of Aaron Farnsworth v. Ralph Hudson, as presented by the appeal of the letter from your office decision of May 23, 1885, holding for cancellation his timber culture entry, made January 28, 1878, upon the NW. $\frac{1}{4}$ of Sec. 9, T. 4 N., R. 16 W., Bloomington, Nebraska.

Affidavit of contest was filed April 15, 1884, charging failure since January, 1881, to cultivate and protect trees upon the tract. Hearing was set for May 22, 1884. On that day a continuance was granted to July 8, 1884, in order that service of notice of contest might be had upon contestee.

Notice was served on May 22, 1884, and on July 8, 1884, the day to which the hearing had been postponed, a further continuance was on motion of defendant granted to September 17, 1884, on which date all parties appeared and the case proceeded. The register and receiver found the testimony conflicting and the case not without doubt, but rendered their decision in favor of the contestee.

Your office found that contestee had failed to comply with the law, and therefore reversed the finding of the local office. The evidence shows, and it is not denied by contestant, that the requisite amount of breaking and planting was done within the time required by law. A large amount of testimony was taken as to the character and amount of cultivation. This is, as stated by the local office, conflicting and in some respects unsatisfactory, but upon careful consideration of the same in all its aspects, I am of the opinion that the preponderance is in favor of the claimant and that the contestant has failed to sustain the charge of failure to cultivate. It is shown that there was plowing or cultivation of the tract originally broken every year following the entry, and that there was replanting of trees where the first planting had failed to grow.

While there was cultivation each year, it appears it was not so thorough as to keep down the growth of grass and weeds, but it is in evidence that to do this in that country is almost if not quite impossible.

Testimony as to cultivation in the spring of 1884 is objected to, because said cultivation was after the initiation of contest by the filing of affidavit of contest. As said affidavit was filed April 15, 1884, it would not seem probable that there could have been in the latitude in which this land lies much if any cultivation earlier in the spring than the date mentioned; besides the notice of contest was not served until May 22, 1884, prior to which there had been cultivation in that year, and the evidence as to said cultivation was therefore admissible as going to show the good faith of claimant.

Upon a careful examination of the whole record as made by the hearing, I must conclude that bad faith is not shown and that the charge of failure to cultivate is not sustained. Your office decision is therefore reversed, and the entry will be allowed to stand.

PRIVATE ENTRY—REPAYMENT.

JOSEPH BROWN.

The Department is not clothed with power to make repayments except by specific statutory authorization.

There is no authority for the return of the excess where the land was improperly sold at double minimum.

Acting Secretary Muldrow to Commissioner Sparks, December 27, 1886.

On August 20, 1883, Joseph Brown made private cash entry of the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 27, T. 4 S., R. 16 W., Little Rock, Arkansas. The

land lies within the granted limits of a grant to the State of Arkansas to aid in the construction of certain railroads, made February 9, 1853 (10 Stat., 155). Said tract was offered at public sale at the minimum price of \$1.25 per acre October 6, 1823. The price was raised to \$2.50 per acre by said act of February 9, 1853, and the land offered at that price in October, 1856, and again in November, 1877. By act of June 15, 1880 (21 Stat., 256), the price was again reduced to \$1.25. Brown paid for the land at the rate of \$2.50 per acre, and on January 6, 1886, applied to your office for repayment of one-half the purchase money paid on his said entry, alleging that at the date of said purchase the price of said land was fixed by law at \$1.25 per acre.

Your office by letter of August 25, 1886, submitted the application to this Department, with a request for instructions for guidance "not only in the case herein presented, but that they may be followed in a number of other cases now pending in this office that involve the same point."

In the case at bar Brown agreed with the register to pay for the land at \$2.50 per acre (see form of cash application 4-001, Circular of March 1, 1884, page 81), the application was allowed, the money paid, and the patent issued. The amount has been covered into the United States Treasury.

The question of repayment first arose in the administration of the public lands on the construction of the act of January 12, 1825. Said act provided:

"That every person who is or may be a purchaser of a tract of land from the United States, the purchase whereof is, or may be void, by reason of a prior sale thereof by the United States, or by the confirmation, or other legal establishment of a prior British, French, or Spanish grant thereof, or for want of title thereto in the United States, from any other cause whatsoever, shall be entitled to repayment of any sum or sums of money paid for, or on account of, such tract of land, on making proof to the satisfaction of the Secretary of the Treasury, that the same was erroneously sold, in manner aforesaid, by the United States, who is hereby authorized and required to repay such sum or sums of money, paid as aforesaid." (4 Stat., 80.) Certain questions arising under this act were referred to the Attorney General, and that officer, on August 14, 1843 (4 Op., 227), rendered his opinion. After pointing out that cases, "where there is a deficiency in the quantity of land purchased," and "where an entry has been made of land to which another had a pre-emption title," fall within the terms of said act, the Attorney General proceeds: "In reference to cases of error arising out of miscalculations of the amounts to be paid, I have had more difficulty. Money thus paid is never properly *in* the Treasury of the United States. It is paid and received by mutual mistake; and as long as it remains in the hands of the receiving officer, I can perceive no good reason why, upon the discovery of the error, he should not be authorized to correct it. After

it has found its way into the treasury, however, like all other money it should be withdrawn in strict fulfilment of the requirements of the law, which the administrative power of the executive department of the government cannot control." The claim of Wilson Shannon for repayment of certain money under the same act was also referred to the Department of Justice. Attorney General Nelson, on September 29, 1843 (4 Op., 253), said: The act "does not embrace all cases of sales erroneously made, but only such as are erroneous by reason of the defect of title in the United States, as in cases referred to in my opinion of the 14th of August. Now, the case of Mr. Shannon is not one in which the title to the lands entered by him is not in the United States, or in which, if the proceedings in the Land Office had been conformable to instructions, a valid conveyance might not have been made, but it is one of mere irregularity, in which attempts to dispose of a portion of the public domain have been made by persons having no authority to sell. It is not a case in which a sale made by the United States cannot be effectuated for the reason contemplated by the act of 1825, but one in which the United States deny the fact of a sale made, and refuse to carry into effect the attempted contract, because those who in their name proposed had no authority to make it. That the sale has been erroneously made is true, but that such error was the result of a want of title in the United States, 'from any cause whatever,' is not true; and this latter is the only class of cases covered by the act of Congress.

"I am therefore of opinion that the purchase money in this case can not be refunded by warrant under the act of January 12, 1825; nor am I aware of any principle upon which, under any supposed general authority of the department to refund, the money once being in the treasury, the repayment can be made.

"It is quite certain, assuming the contract of sale to have been one which the United States should not have consummated that the purchase money now asked to be refunded should never have been received into the public treasury. It is there wholly without consideration, and is the money of Mr. Shannon, to which the United States have no claim, and to which he is unquestionably entitled. But who is to restore it to him? It can be withdrawn from the treasury only by virtue of some law. I know of no enactment authorizing repayments, except that of 1825, which I have endeavored to show does not apply to this case.

"It will not do to say that the Department may refund simply because it is just that the money should be repaid, or that it is in the hands of the government by mistake, or without consideration. The same thing might have been predicated of the cases provided for by the act of 1825, and if in those cases the intervention of the legislative power was necessary, it seems to me equally so in this. The case of Mr. Shannon is unquestionably a hard one, and may evince the propriety of some general legislative provision, by which the Secretary of

the Treasury may be clothed with authority to grant relief in like cases, but it can afford no warrant for the disregard by the Department of a most wholesome and salutary restraint upon the due and strict observance of which the most important interests depend."

Following the principle indicated by the Attorney General, I am of the opinion that this Department is not clothed with power to make repayments where the money has been paid into the treasury, unless specially authorized by statute so to do. The existing legislation on this subject is as follows: Section 2362 of the Revised Statutes provides for repayment in cases where a tract of land "has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed;" the act of May 16, 1880, provides that repayment may be made of fees and commissions and excess payments upon the location of claims under Section 2306, R. S.; where said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon canceled, or where entries shall be canceled for conflict "or where from any cause the entry has been erroneously allowed, and cannot be confirmed."

It is clear that the present application does not come within any of these provisions, and for that reason must be refused.

REPAYMENT—FRAUDULENT ENTRY.

JOSEPH WALSH.

Repayment will not be made if the entry was obtained through fraud.

Acting Secretary Muldrow to Commissioner Sparks, December 27, 1886.

On May 25, 1881, Joseph Walsh made pre-emption cash entry of NE. $\frac{1}{4}$ of Sec. 32, T. 41 N., R. 16 W., Marquette, Michigan. On August 16, 1883, your office held said entry for cancellation for fraud, finding from the report of a special agent, "and the sworn statement of parties cognizant of the facts," that claimant had made said entry at the instance and in the interest of E. L. Thompson and others forming the "Delta Lumber Company;" that the buildings referred to in the proof were erected by said company as a boarding and lodging house for the men employed by Walsh for the company, and as a stable for the horses; "that Walsh never did for himself and at his own expense any act of settlement looking to the establishment of a home on the land in question, but that the same has been used for the purposes of the said lumber company in establishing thereon a saw mill, docks, etc., for the carrying on of an extensive lumber business;" that soon after the issue of cash certificate, Walsh leased the land to said company for the term of fifty years in consideration of the rents already paid, and that he had quit his residence on land of his own in the same State to settle on this claim. Walsh was notified of this decision and allowed sixty days within which

to show cause why his said entry should be re-instated. Claimant failed to appear, and took no further action in the matter until August, 1885, when he made application for repayment of the purchase money paid on said entry. Your office, by letter of September 5, 1885, rejected the application.

Claimant urges that the Commissioner had no authority to cancel said entry on the report of a special agent, and further that the entry was made in entire good faith, and in fact was not fraudulent. These are matters that should have been presented by appeal from said decision. What would have been the action of this Department if they had been so presented it is not necessary to indicate. Claimant failed to avail himself of his proper remedy, and gives no reason for such failure. To allow him to attack the finding of the Commissioner in this proceeding would be to violate the well known legal principle that a judgment cannot be assailed collaterally.

The finding that said entry was fraudulent must as against the claimant be taken as true. This being the case, the Department can furnish no relief to the applicant. Repayment will not be made where the entry has been obtained by fraud. C. A. Linstrom (2 L. D., 685); Jens Stohl (*Ibid.*, 686).

Said decision is accordingly affirmed.

PRIVATE CLAIM—JURISDICTION—ACT OF JULY 1, 1864.

RANCHO DE NAPA.

The jurisdiction of a court of limited authority appearing, the regularity of subsequent proceedings will be presumed in the absence of anything to the contrary in the record.

As the case was pending in the United States district court at the passage of the act of July 1, 1864, new jurisdiction was thereby conferred, and the court had full authority to revise a former survey and order a new one if deemed requisite.

The approval of such new survey however by the court was without jurisdiction, for the supervision thereof was by the express terms of said act vested in the Commissioner of the General Land Office.

The Rancho Alisal case, in so far as it recognized such approval by the court, is overruled.

Acting Secretary Muldrow to Commissioner Sparks, December 28, 1886.

I have considered the appeal of Otto H. Frank from the decision of your office of May 5, 1885, relating to the resurvey of that portion of the Rancho de Napa, in Napa County, California, which was confirmed to him.

The Rancho de Napa was granted by the Mexican government to Don Salvador Vallejo, who at different times sold portions thereof and afterwards on December 20, 1851, sold and conveyed the remainder to one Herman Wohler, who, after selling other portions to different per-

sons, on March 20, 1852, sold and conveyed the residue by deed to Otto H. Frank, the appellant herein.

The grant was never presented to the Board of Land Commissioners as an entirety, for confirmation, but quite a number of claims for portions thereof were separately presented to the board, a list of which may be found in Hoffman's Reports, appendix, p. 118. Some, which were not presented to the board in time, were afterwards acted upon by the U. S. district court of California, being specially thereto authorized by the act of Congress of June 20, 1884, (23 Stat., 49.)

The claim of Frank was presented to the Board February 23, 1853, and confirmed August 22, 1854. On appeal by the United States, after consideration and argument, on February 23, 1857, the decree of the Board was affirmed by the United States district court. From this last decision a further appeal was taken, but dismissed with leave to the claimant to proceed under the decree of said court "as under final decree."

By direction of Surveyor General Mandeville, dated September 13, 1858, Deputy Tracy made survey of the claim, which survey was approved by Mandeville on January 4, 1860. In February and March, 1862, said survey was published in compliance with the supposed requirements of the act of June 14, 1860, (12 Stat., 33,) and on March 11, 1862, on application of the United States district attorney, the same was ordered into the United States district court for examination and adjudication, where, after consideration, on January 11, 1869, it was ordered that said survey be so modified as to embrace four additional tracts specified in the order, and that the modified survey be returned into court for approval. The survey under this order was made by Deputy Dewoody, returned into court February 10, 1871, and approved by Judge Hoffman May 3, 1871.

On March 26, 1878, Frank, through his counsel, made application to the surveyor general of California for a publication of the Tracy survey in accordance with the provisions of the act of July 1, 1864 (13 Stat., 332) claiming that the proceedings before the United States district court in relation to said survey were entirely without its jurisdiction, and consequently null and void. This application was denied by the surveyor general, and the papers transmitted to your office, where, after consideration and argument, on April 21, 1879, a decision was rendered granting the application. An appeal was taken from this decision, by Woodward and others, claiming interests under the survey confirmed by the district court, and on September 20, 1879, said decision was affirmed by Acting Secretary Bell.

By said decision the surveyor general was directed to make publication of the Tracy survey in accordance with the provisions of the act of 1864, and upon expiration of the time prescribed, and the termination of such proceedings as may thereupon be had, under said act, to transmit a full record of the same to your office.

Prior to the receipt of any report of the execution of said decision, on February 9, 1882, R. B. Woodward and others made application to your office to issue patent to Frank upon the survey approved by the district court, it being insisted that the case was similar to that of the Rancho Alisal, which was decided by this Department January 4, 1882, (I. L. D., 198). The application of Woodward was transmitted to this Department for instructions, and on July 25, 1882, my predecessor, Secretary Teller, directed that the case, pending before the surveyor general, proceed in the usual manner, if Frank so desired, as he was entitled to be heard though the facts in his case might be similar to those in the Alisal case, and the application for the issue of patent at that time was denied.

On March 31, 1884, the proceedings before the surveyor general were brought to a conclusion, and a full report made by him, from which it appears that, after due notice had been given, in accordance with the act of 1864, of the survey of Frank's part of the Napa Rancho by Tracy, in 1858, a protest was filed by Frank and the Woodwards against said survey, on the ground that it did not embrace all of the land confirmed to Frank; other parties also intervened to protect their rights. Testimony was also taken from time to time; and the surveyor general found that the condition and facts of the said case, as to the surveys, being similar to those in the Alisal case, he was bound by the authority of the Secretary's decision therein, must overrule the protests against and objections to the Tracy survey, and hold that the action of the United States district court in approving the Dewoody survey was final.

The surveyor's decision was affirmed by your office on May 5, 1885, and on appeal from said affirmance the case is now before me.

This decision of your office was based entirely upon the opinion of Secretary Kirkwood in the Alisal case (*supra*), which indeed could not have been disregarded. For in that opinion my predecessor not only adopted a construction of the statute by which he decided that the action of the district court was final and conclusive in the case of the Alisal grant, but he went further, and in terms applied that ruling to the case of the Rancho de Napa.

Inasmuch as this last case was not then before the Secretary, his ruling in relation thereto can in no sense be treated as *res judicata* by this Department, but the claimants of Napa Rancho are entitled to be heard as fully as though no allusion had been made in said decision to their claim.

The facts in the Alisal case, so far as disclosed by the opinion, are nearly similar to those in the present. In both the surveys were made and approved by the surveyor general prior to the act of 1860, were advertised after its passage in compliance with its supposed requirements, afterward ordered into the district court and approved subsequently to the passage of the act of July 1, 1864 (*supra*). On this state of facts my predecessor held, in substance, on the authority of the case of the

United States *v. Halleck* (1 Wall., 453), that, inasmuch as proceedings to reform the survey in the Alisal case were "pending" in the United States district court, whether rightly or wrongly, at the time of the passage of said act of 1864, no question relating to the jurisdiction of that tribunal to act in the premises could be raised after its passage; and no appeal having been taken from the action of the court in approving the survey, the same became final, and patent was directed to issue in conformity therewith.

I have carefully considered said opinion; and while concurring in some of the views of my predecessor therein, I am compelled to dissent from the conclusion arrived at by him.

By the act of March 3, 1851 (9 Stat., 631), "to ascertain and settle private land claims in the State of California," parties having such claims were to present them to the Board of Land Commissioners for confirmation, with the right of appeal from that tribunal to the United States district court, and thence to the supreme court, by either the government or claimants, if aggrieved.

In the case of the United States *v. Charles Fossatt* (21 How., 445,) the supreme court, in construing the above act, held that the jurisdiction of the Board and of the United States courts, on appeal, extended not only to questions relating to the validity of the grant, but to questions involving its location and boundaries; and that for the settlement of these latter questions the power of the courts did not terminate until the issue of patent, conformably to the decree.

In the case of the United States *v. Sepulveda* (1 Wall., 104), after confirmation was made by the Board, the appeal taken therefrom to the district court was dismissed by order of the Attorney General, without any action by the court other than entering such order of dismissal, with leave to the claimants "to proceed upon the decree of the commissioners as upon a final decree." Afterward survey was made and approved by the surveyor general prior to the passage of the act of 1860. But upon the passage of said act, on the suggestion of the district attorney, the survey was ordered into the district court for revision; where, after consideration, a new survey was directed to be made. From this action an appeal was taken, and the supreme court held: (1) There was no authority to order the survey into court, under the provisions of the act of 1860, it applying to surveys subsequently made, or those previously made which, at the passage of the act, were pending in court for contest or reformation; (2) and further, the court had no jurisdiction to correct the survey, under the Fossatt case (*supra*), and make it conform to the decree, for "whatever jurisdiction the court may have possessed to enforce the execution by the surveyor general of its own decrees, it possessed no control over the execution of the decrees of the Board." The action of the district court was therefore reversed, and the parties remitted to the land officers for relief, if entitled to any.

Now, it is to be observed that the jurisdiction of the United States district court never attached in the Sepulveda case, it being held that the mere taking and dismissing the appeal without action thereunder conferred none; that the decree sought to be enforced was the decree of the Board, over which the court had no control whatever. But in the Napa grant there was an appeal from the decree of the Board to the United States district court, where a hearing was had and action taken, as shown by certified copy of the decree of the court filed in this cause, as follows :

District Court of the United States, Northern District of California,
Stated Term, February 23, 1857.

THE UNITED STATES *v.* OTTO H. FRANK.

This cause coming on to be heard upon the transcript of the record therein before the Board of Commissioners for the ascertainment and settlement of land titles in California, and upon the pleadings and evidence on file in this court, and it appearing to the court that said record was duly filed, argument of counsel on the part of claimant and of the United States having been heard, it is now finally adjudged and decreed that the decree of said Board confirming the claim of claimant Otto H. Frank be and the same is hereby affirmed; and it is adjudged and decreed that the claim of said Otto H. Frank is a good and valid claim, and the same is hereby confirmed.

Then follows a description of the land confirmed, which is the same as that used in the decree of the Board.

Afterward, on June 12, 1858, when the appeal which had been taken by the United States district attorney to the supreme court was dismissed, the following was entered :

"The Attorney General of the United States having given notice that appeal will not be prosecuted in this case, and a stipulation to that effect having been entered into by the United States attorney : on motion of the district attorney it is ordered, adjudged and decreed that claimant have leave to proceed under the decree of *this* court heretofore rendered in his favor as under final decree."

It is thus made plain that the jurisdiction of the district court had attached to the Napa grant; that the *final decree*, under which alone survey could be made, and was made by Tracy, was the decree of the United States district court, not the decree of the Board; and therefore, in the language of the supreme court in the Fossatt case (p. 450), "the power of the district court, under the acts of Congress, does not terminate until the issue of patent, conformably to the decree."

There is nothing to be found in the act of 1860 inconsistent with the jurisdiction above asserted. That act applied to surveys of private land claims thereafter made, or to those theretofore made which at the time of its passage were pending in court on contest. All surveys thereafter made were to be published, and could be ordered into court for revision, on the application of any party deemed by the court to

have a proper interest in the matter. That tribunal, after full examination and hearing, was authorized to set aside, annul, amend, or affirm the survey; and when the survey, whether original or amended, was approved by the court, plat thereof was to be sent to the Commissioner of the General Land Office, who was to issue patent thereon.

There is nothing in the record relating to the ordering of the Tracy survey into court to show that such action was taken under the act of 1860, further than the statement of the district attorney in his application that the survey had been published under the provisions of that act. With this exception that act is not mentioned in the proceedings, and consequently there is no record evidence to show, as is asserted, that said survey was ordered into court under the supposition that the act of 1860 authorized such action, rather than that it was brought into court to be reformed under the provisions of the act of 1851, as construed in the Fossatt case above quoted.

But it is immaterial whether or not the district attorney, or the court, took action in accordance with an authority supposed to be, but which was not, conferred by the act of 1860, if in point of fact the court did have jurisdiction of the survey, and its action was in accordance with its powers. Of the jurisdiction and power of the court to review and reform the survey, I think it has been shown there can be no doubt, under the ruling in the Fossatt case.

After the survey of Frank's part of Napa had been returned into court and was pending there, Congress passed the act of July 1, 1864 (13 Stat., 332), by which the act of 1860 was totally repealed and the jurisdiction of the authorities of the land office was re-established in relation to the surveys of private land claims in California, except as to causes pending undisposed of in the United States courts. With regard to the latter class in the second section was a proviso—

“That where proceedings for the correction or confirmation of a survey *are pending*, on the passage of this act, in one of said district courts, it shall be lawful for such district court to proceed and complete its examination and determination of the matter, and its decree thereon shall be subject to appeal to the circuit court,” etc.

At the time of the passage of said act the survey of Frank's part of Napa, which had been returned into court more than two years before on an application to reform it, was yet upon the docket undisposed of. Consequently in the language of the law “proceedings for the correction” of the same were then “pending,” and the provisions of the new act became at once applicable thereto; and the new jurisdiction thereby conferred upon the court attached, even though it had no jurisdiction before that time.

There is no force in the contention that “pending” here means “properly” pending. Such construction would be to import a word into a statute, plain and unambiguous on its face, in order to change its meaning. Had Congress enacted that all cases involving private

land claims "pending" in the district court should be dismissed or transferred to the circuit court, would it be contended that before such dismissal or transfer the district court should investigate and determine what cases were "properly" pending therein, dismiss or transfer only such, while cases held to be improperly pending would, despite the act of Congress, remain on the docket? Secretary Kirkwood maintains this view with great force in the Alisal case, referring to the ruling of the supreme court in the case of *United States v. Halleck*, (*supra*).

In the latter case, after confirmation by the Board, appeal was taken to the district court and dismissed, with leave to proceed under the decree of the Board as under final decree. Survey was made and approved in 1857 by the surveyor general and the Commissioner of the General Land Office, but disapproved by the Secretary of the Interior, and a new survey ordered. In November, 1859, the district court, construing the Fossatt case, (*supra*,) decided shortly before, to confer such power, on application, ordered the new survey to be returned into court for revision. In 1861 the court set aside said survey and ordered another, but, on rehearing, approved the original survey. From this action an appeal was taken to the supreme court.

This state of facts shows a case, where the final decree was that of the Board, and not of the court, and therefore the latter tribunal had no jurisdiction so to act when the survey was ordered into court, as was held in the Sepulveda case. But the supreme court, in affirming the action of the district court in the Halleck case, say, that inasmuch as the new survey had been returned into court—

"And proceedings upon the exceptions were *pending* on the passage of the act of June 14, 1860, whatever question might be raised as to the jurisdiction of the district court to supervise the survey previous to that act, there can be none since its passage. That act applies not merely to surveys subsequently made, but also to such surveys as had been previously made and approved by the surveyor general, and *returned into the district court* upon objections to their correctness."

Surely there ought to be no further question as to the right of the district court to order a new survey in the Napa grant, as it did by its decree of January 11, 1869, the language in the act of 1860 and that in the act of 1864 being the same, and both acts being in *pari materia*.

To this extent I concur in the views of Secretary Kirkwood in the Alisal case, but dissent from his conclusion that the approval of the ordered survey by the court was conclusive on the Land Department, and patent should be issued in accordance with said approved survey. Under the act of 1851, as construed by the Fossatt case, and under the act of 1860, as construed by the Halleck case, where the jurisdiction of the United States district court had attached, and there was power to reform the survey of a private land claim, the control of that tribunal over the cause continued, in the first instance, in the language of the Fossatt case, "Until the issue of a patent conformably to the decree;" and in the other instance, in the language of the act itself, the decree

of the court approving a survey had "the same effect and validity in law as if a patent for the land, so surveyed, had been issued by the United States."

But the act of 1864 changed this; and took away all jurisdiction over surveys of private claims from the courts, as was said before. And whilst authorizing the court, in pending cases, "to proceed and complete its examination and determination of the matter" of the confirmation or correction of surveys, by the third section expressly provided that, when in such case a new survey is ordered, either by the district court, or the circuit court, on appeal therefrom, "the subsequent survey of the surveyor general shall be under the supervision of the Commissioner of the General Land Office, and not of the district or circuit court of the United States."

In the face of this plain and mandatory language of the statute, withdrawing and emphatically prohibiting the exercise of such jurisdiction, my predecessor, Secretary Kirkwood, held in the Alisal case that the court had power to and did properly approve the new survey. I can but think that when said decision was written this provision of the third section was overlooked, or not duly considered.

Entertaining these views, I must decide that the United States district court had authority to order into court the survey of Frank's part of the Rancho Napa, independent of the act of 1860; that said cause being therein "pending" at the time of the passage of the act of 1864, the new jurisdiction thereby conferred at once attached; and the court had full power to revise the Tracy survey and order a new one, as it did. But, when this was done, the power of the court was exhausted and its further action in approving the Dewoody survey was simply without its jurisdiction, and in violation of the clear mandate of the law. Like any other act—*coram non judice*—done without authority, it has no binding efficacy whatever, and the claimant or the officers of this Department are no more bound by it than they would have been if the court had ordered the land to be sold and the proceeds appropriated to the payment of the public debt. *Cooper v. Reynolds* (10 Wall., 315).

It is insisted in behalf of Frank that whatever might be the binding efficacy of the action of the district court otherwise, it should not affect him or his rights, because he was no party to the proceedings therein, having had no notice of the same.

According to the views heretofore expressed, the district court never lost the jurisdiction of this cause, which it acquired on appeal, when it undoubtedly had jurisdiction both of the person and the subject matter. The subsequent proceedings in relation to the survey were but a continuation of said case, for the purpose of making the survey conform to the decree, as the court had a clear right to do, under the Fossatt decision. The act of Congress is silent as to what notice, if any, is required to be given when a survey is ordered into court, and there is nothing in the record to throw any light on this point. Considering the nature

of the case, this objection of Frank is not to the jurisdiction of the court, but to the regularity of its proceedings; for these matters affecting the surveys of private land claims are in the nature of proceedings *in rem*, as was held in *Henshaw v. Bissell*, 18 Wall., 268. If only alleged irregularity, the jurisdiction of the court being complete, every presumption is against it, the general rule being that in courts of record all things are presumed to have been rightly done. See *Miller v. United States* (11 Wall., 299). On this question the supreme court, in that case, says:

"In courts of limited jurisdiction . . . there is a presumption against jurisdiction, but when that appears they are entitled to the same presumptions in favor of their action as other courts are. The district and circuit courts are of limited jurisdiction, but they are not inferior courts, and they are therefore entitled to the same presumptions in their favor. Those presumptions are that the court, having jurisdiction, and having entered a judgment, did everything that was necessary to warrant its entry of the judgment. Undoubtedly the contrary may be shown in a court of error, but the burden of showing it is upon him who alleges error, the legal intendment is against him."

It is not necessary to pile up authorities to sustain a position so well settled.

Therefore if Frank wants to show that he had no notice of and was no party to the proceedings in the district court, whether its jurisdiction attached before or only after the passage of the act of 1864, he must make the fact properly apparent in some other way than the one adopted, namely: the filing of an affidavit that he had no such notice. *Thompson v. Tomline* (2 Peters, 165); *Voorhees v. Bank of United States* (10 Peters, 173).

In the case under consideration, a transcript of the whole record of the proceedings in court, in relation to the survey, is not filed, but only detached portions, containing the application of the district attorney to have the survey ordered into court for correction; the order of the court thereon; service on surveyor-general; the order of the court directing amendment of survey, and its order approving the amended survey. In none of these papers is there anything to show that Frank was not notified or was not present. Indeed, in the decree ordering a new survey there is language from which it would be plainly inferable that Frank was in court and heard through counsel. The decree says: "This cause coming on this day to be heard was argued by counsel and thereupon, and in consideration thereof, the attorneys for the intervenors and the district attorney being present, and no one objecting, it is ordered," etc.

The inference here would seem to be that on argument of counsel, other than those for the United States and the intervenors, who being present and not objecting, the amendment was ordered. Inasmuch as there could be only Frank, the claimant, the United States and intervenors interested in such proceeding, the supposition would naturally

be that the "counsel" spoken of was Frank's. If these inferences be not correct, there is clearly nothing in the record to show that the proceedings were not regular, and therefore they must be presumed to have been regular.

I therefore dismiss this objection, with the remark that it is singular that Frank should have slept upon his rights under the approved Tracy survey—alleged by him to be wrong—from January, 1860, until March, 1878, a period of eighteen years, without knowing or endeavoring to find out the condition of his claim, and this too, notwithstanding public notice of the approval of said survey was given by the surveyor general in 1862.

In accordance with these views, the judgment of your office is modified, and a survey of Frank's claim, made in accordance with the decree of the district court, will be approved and patent issued thereon. If, on examination, the Dewoody survey is found to conform to said decree, I see no reason why it may not be approved; otherwise another should be made. So far as the Alisal case and others conflict with the views herein expressed they are overruled.

It is stated in behalf of Frank that there are grantees from Vallejo and Wohler, prior to the deed from the latter to Frank for the residue of the Napa Rancho, whose claims, owing to various causes, have not yet been located, and that it would be a hardship upon him to proceed with a survey of his claim under such circumstances, and therefore he asks for delay until such prior claims are properly located. I do not well see, as at present advised, how this request can be complied with. It would seem that the district court having jurisdiction to determine the matter, and having ordered a survey of Frank's claims according to certain metes and bounds, courses and distances, prescribed in its decree, it becomes the duty of the Land Department to make survey and issue patent thereon, leaving Frank and other parties to settle their conflicting claims, if any, in the proper courts.

TIMBER CULTURE CONTEST—EVIDENCE.

NELSON v. PHELPS.

Under a charge of failure to comply with the law the third year of the entry, evidence is not admissible as to improper preparation of the soil during the preceding years.

Acting Secretary Muldrow to Commissioner Sparks, December 28, 1886.

I have considered the case of Swan Nelson v. William T. Phelps, involving timber-culture entry made by the latter, September 11, 1880, for the N. E. $\frac{1}{4}$ of Sec. 19, T. 121, R. 64, Aberdeen land district, Dakota, on appeal by the latter from your office decision of March 3, 1885, holding said entry for cancellation.

Contest was initiated December 3, 1883, the affidavit charging—

That claimant Phelps wholly failed to plant, sow, or cultivate five acres of timber trees, seeds, or cuttings, during the third year of entry, to wit, between September 11, 1882, and September 11, 1883, and wholly failed to cause the same to be done up to the present time; and wholly failed during the third year after the date of entry to cultivate the five acres broken the second year after said entry.

Hearing was had March 6, 1884. At the very outset inquiry was made as to the manner in which the first year's breaking was done, and whether the land broken the first year was properly backset and cultivated the second year. To this claimant at once objected, on the ground that contestant's allegations in no way referred to the first or second year's operations, and that he had not brought with him the persons who had done the breaking the first year, or the cultivating the second year, and who would have been witnesses in his behalf had he been notified that his operations during those years were to be brought into question. The local officers sustained the objection, but the examination relative to those two years (as well as the third) proceeded.

With regard to the first five acres broken: The testimony tends to show that the tract was injudiciously selected, through lack of experience and foresight on the part either of the entryman or the person who did the plowing for him; it was such low ground that in the spring it was too wet, from receiving the drainage of the adjacent water-sheds, and later in the season it was too dry—positively "baked," as one witness words it—so that the roots of young trees planted therein would be left for weeks, if not months, without a particle of moisture.

The testimony adduced (under objection, as aforesaid,) tends to show that the breaking of this first five acres was poorly done—strips of various widths being left unturned or uncovered. Of course, on attempting, the second year, to cultivate this breaking, no sod could be "backset" where no sod had been turned the first year; and the testimony is very contradictory as to whether indeed this first year's breaking was "backset" or cultivated in any manner the second year.

The planting of the first five acres the third year was entrusted, under contract, to a company (R. W. Day & Co.), who had seven or eight years' experience in planting throughout Iowa, Nebraska, and Kansas. They were to receive a stated compensation for securing ten acres of growing trees on the tract; and in case of failure they were, without extra charge to continue replanting until that result was attained. It was for their own interests to do the work faithfully and well, and the testimony shows that they did so; that is, they planted more than the requisite number of trees, and took pains to plant them as well as was possible in land a portion of which had not been properly broken two years before, and hence not properly backset a year before. The trees were cultivated, a short time after planting. One witness states that ninety per cent of them leaved out and began to grow. Afterward there came on

a severe and long-continued drought, and a large proportion of them died. It is in evidence that the attempt to raise trees in this region that season was an almost universal failure.

The second five acres broken was also upon too low ground, and upon advice of one of the witnesses—the manager of the gang that was doing the planting—other five acres were broken elsewhere. This witness says:

The ground was too wet in a wet season and too dry in a dry season for any success in tree-growing; at the time the trees were planted, the second five acres was so dry that you couldn't backset it with two teams. . . . We therefore broke another, a second five acres. . . . We had extra pay for that; we had orders to do so from the owner of the claim, Mr. Phelps, after stating the facts of the case to him, which he evidently didn't know at the time.

Thereupon the claimant forwarded to your office an application for a year's extension of time, in order that this last-ploughed tract might be brought under cultivation and planted.

It would thus appear that an unwise selection of ground, an inadequate preparation of the ground during the first and second years, and the long drought, are three factors which contributed (to how great an extent respectively can not be decided) to the death of the trees on this claim. In short, the facts shown at the hearing are summed up with substantial correctness in the letter of the register and receiver to your office, as follows:

It is clearly established that the requisite number of trees were planted within the proper time, and that their failure to grow was due to the fact that the land was not properly prepared or cultivated to make it fit for tree-culture. To this defect the severe drought contributed. For the latter the claimant is not responsible—with the first he is not charged. We find as facts that said claimant did not fail to plant or cultivate five acres of timber, trees, seeds, or cuttings, on said tract during the third year after entry.

For the reasons above given, the local officers dismissed the contest. Your office, however, reversed the decision of the local officers, on the ground that—

The allegation contained in the affidavit of contest of necessity relates back to the proper preparation of the land for tree-culture during the first and second years, as the planting can not be properly or legally done unless the law has been complied with during those two years.

I am clearly of the opinion that the local officers were correct in holding that the claimant could not be called upon to defend himself against an accusation that had not been alleged, and which it could not be presumed he would come to trial prepared to meet. The government, however, being a party in interest, might very properly take notice of any failure to comply with the requirements of the law which might be disclosed in the course of the proceedings; but in such case a new hearing would be necessary, with notice to claimant of charges bearing upon

the first and second year's operations. If this course were to be pursued, however, it is safe to presume that the same evidence with reference to the poor plowing of the first five acres would be offered that has already been introduced; the only additional evidence likely to be offered would be by the claimant in his own defense. In my opinion such a hearing is not necessary in order to arrive at substantial justice in this case, without any violation of the ordinary rules of legal practice. Taking the testimony against the defendant as it stands, it indicates poor judgment on his part, coming into the Territory a stranger, in the selection of ground for the growth of timber, and the failure on the part of the person hired by him to do the first year's breaking to perform that work properly. Even holding him responsible for the imperfection of the work done by his employé, we find him thereafter using every effort to remedy the evils resulting therefrom; so that not only is no bad faith manifest, but good faith and an earnest attempt to fulfill the requirements of the law is affirmatively shown. I therefore reverse your office decision of March 3, 1885, holding said entry for cancellation.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

GRAHAM v. SOUTHERN PAC. R. R. CO.

The appropriation of land for a public purpose that had been, prior thereto, withdrawn as within the indemnity limits of a railroad grant, and its subsequent restoration to the public domain, works a revocation of the withdrawal and leaves the land open to the first legal applicant.

Acting Secretary Muldrow to Commissioner Sparks, December 31, 1886.

SIR: I have considered the case of Joseph R. Graham v. the Southern Pacific Railroad Company, as presented by the appeal of the company from the decision of your office, dated April 28, 1885, rejecting its claim for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 23, T. 21 S., R. 29 E., M. D. M., Visalia land district, California.

The record shows that said tracts are within the indemnity limits of the grant to said company by act of Congress approved July 27, 1866 (14 Stat., 292). The withdrawal of the odd numbered sections within said limits was ordered by your office letter, dated March 22, 1867, and was received at the local land office May 21st same year.

It appears that on January 4, 1875, the land in controversy was (with other tracts) withdrawn by the United States surveyor general, for the Tule River Indian Reservation, and remained a part of said reservation until August 3, 1878, when it was restored to the public domain by executive order, due notice of which was given to the local land officers on August 15, 1878.

It does not appear when the first township plat of survey was filed in the local land office, but an amended plat of survey under said execu-

tive order was filed in the local land office on September 4, 1878. Graham made homestead entry of the land in question on November 29, 1878, and on December 3, 1883, made final proof. The local officers found the proof sufficient, and recommended that it be accepted. Your office, on appeal by the company, sustained the recommendation of the local land officers.

It is insisted by the company that said tracts have been continuously withdrawn since May 21, 1867, and Graham could acquire no rights while the withdrawal remained in force, and also that the company will need all of the lands in the odd numbered sections within the indemnity limits to satisfy the losses within the granted limits. But it must be remembered that the lands in question are in the indemnity limits and the company can acquire no right to the same, unless by selection. The company has not selected the tracts in controversy.

The effect of the withdrawal for said Indian reservation and the subsequent restoration to the public domain must be held to operate as a revocation of the withdrawal for the benefit of said company, so far as to allow the land to be selected by the first legal applicant. Graham appears to be the first legal applicant. His entry was allowed and he has made valuable improvements upon the land to the amount of \$1,000 or \$1,200. His claim must be held superior to that of the company.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—*RES JUDICATA*.

HOLMES *v.* NORTHERN PAC. R. R. CO.

By a decision that became final that portion of the claimant's entry which lay within the railroad limits was canceled. On application for re-instatement it is held that the matter is not *res judicata* as the question now is solely between the government and the entryman.

Land appropriated at the filing of the map of general route, but released from such appropriation prior to definite location, is not held to await the same, but is open to the first legal applicant.

The right to purchase under the act of June 15, 1880, existing at definite location serves to except the tract covered thereby from the operation of the grant.

Acting Secretary Muldrow to Commissioner Sparks, January 4, 1887.

I have considered the case of Charles Holmes *v.* the Northern Pacific Railroad Company, involving the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 13, T. 2 S., R. 5 E., Bozeman, Montana Territory, on appeal from your office decision of October 23, 1883, refusing his application to amend his homestead entry, No. 4, made January 2, 1875, for the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 24, same township, so as to include the tract first described. It appears that his entry as originally made covered both of the tracts described, and that final proof was made and final certificate, No. 142, issued thereon October 9, 1877. When the case came up to your office for its action,

said entry was, so far as it covered land in the odd section, held for cancellation "for conflict with the withdrawal for the grant to the Northern Pacific Railroad Company, upon general route, the withdrawal for which took effect February 21, 1872."

On appeal, the Department, January 29, 1881, affirmed the action of your office. The entry was thereupon canceled, February 10, 1881, as to the eighty acres in the odd section and approved for patent as to the remaining eighty, being in section 24.

Holmes now applies to amend his entry of the tract in section 24, so as to embrace the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 13, this being the tract covered by his original entry, which was canceled as above stated.

In making this application he claims that the tract was excepted from the grant to the railroad company by the homestead entry of one Henry Miller, made February 5, 1872, and covering this land, which entry was canceled July 16, 1872. It will be observed that the withdrawal for the railroad company, on account of which Holmes's entry was canceled, was made while Miller's entry was intact on the record.

The decision appealed from in effect holds that if the question at issue had been under consideration as an original one, the application could under existing rulings have been allowed, but as Holmes's rights to the tract in controversy were fully considered, and were finally adjudicated under the rulings in force at the date of the cancellation, the case can not now be re-opened. In other words, the holding of your office decision is that the case is *res judicata*.

Upon an examination of the case as now presented, and a consideration of the questions involved, I find the conditions somewhat different from what they were at the date of the adjudication in 1881, in fact so changed as, in my judgment, to entitle the case, as presented, to consideration and determination.

Though in the adjudication referred to, it was held that Holmes was not entitled to the tract under his original homestead entry, because of the adverse claim of the railroad company under its grant, it has since become a well settled rule of law, as interpreted by this Department, that, in such cases as this, where an entry existed at the date of filing the map of general route, and of the withdrawal thereunder, which entry was after such filing and before definite location of the road canceled, the land covered thereby becomes public land which is not to be held to await the definite location of the road, but is open to the first legal applicant. *Talbert v. Northern Pacific Railroad Company* (2 L. D., 536). In the case of *Holmes v. the Northern Pacific Railroad Company*, as formerly adjudicated, the tract in question was at the date of withdrawal for the benefit of the company on its map of general route appropriated by the entry of Henry Miller, which was subsequently canceled, and before the date of definite location was entered by Holmes. His entry having been canceled and the case closed by the departmental

decision of January, 1881, the case as then presented has become *res judicata* as between Holmes and the railroad company.

This, however, does not change the fact that the title to the land being still in the government and subject to its disposal, must be disposed of according to law. It can not be held that by the former judgment, now admitted to have been erroneous, the government is bound to pass title to the land to the company in disregard of the law. While Holmes now comes here asking to be allowed to amend his entry so that it may embrace the tract in question, his application is, in effect, a petition for the reinstatement and recognition of his claim under his entry as originally made, since the tract covered by his application to amend is the same which was embraced in his original homestead entry, but which was eliminated, not by any act of his, but by the erroneous judgment mentioned. He urges his claim because of his occupancy for years of that tract and his valuable improvements thereon. This occupancy and improvement could of course avail him nothing as against the rights of another party having a superior claim, but as between him and the government it is not without weight.

In the case of *Hastings and Dakota Railroad Company v. Whitnall*, decided by this Department November 19, 1885 (4 L. D., 249), it was held that, although under a decision that became final, the claim of the entryman was rejected and the land awarded to the railroad company, it now appearing that the company has no valid claim to the land, thus leaving the question between the government and the entryman, he should be allowed to make a new entry for the land.

What is the present status of the railroad company as to the tract in question? Has it any valid claim thereto? If it has, it must be by virtue of the definite location of its line of road, and not by virtue of the withdrawal on map of general route. For reasons already stated the latter gave it no right or title to the land.

A new question is therefore presented for consideration—one not before the Department when the former case was decided. That question is one as to the effect of the filing of map of definite location. Did it operate to render the grant to the company effective as to this tract? Said map of definite location, it appears, was filed in your office in July, 1882, about a year and a half after departmental decision was rendered on which the plea of *res judicata* is now urged.

The third section of the act of July 2, 1864, (13 Stat., 365,) granted to said company all lands to which the United States had full title, not reserved, etc., "and free from pre-emption or other claims, or rights, at the time the line of said road is definitely fixed."

Holmes has continued to claim and to occupy the tract in controversy and still claims and occupies it, and he is now here asking that his original entry be so amended as to include it. He occupied and claimed it at the date of the definite location of the line of the road. On the

foregoing facts Holmes has the right of purchase under the act of June 15, 1880 (21 Stat., 236), the second section of which provides—

“That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor Provided, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.”

In the case of Northern Pacific Railroad Company *v.* Burt, decided by this Department April 21, 1885 (3 L.D., 490), it was held that Mrs. Burt, who was the widow of a homestead entryman whose entry, subsisting at date of withdrawal on general route, had subsequently thereto and prior to date of definite location been canceled, had the right, under the law quoted, to purchase, notwithstanding the cancellation and the subsequent definite location of the road. In that case there was no allegation of residence or occupancy by the widow or by any one for her after the death of the entryman, which occurred in July, 1875, and her right to purchase was recognized ten years thereafter. In this there have been continuous claim and occupancy, and the land has on it valuable and permanent improvements. There has been no homestead entry of the tract by another; consequently the proviso in the law quoted from the act of June 15, 1880, places no inhibition upon the right of Holmes to purchase under said act.

Applying the rule enunciated in the Burt case to this, it is clear that Holmes has the right of purchase, and that such right existed at the date of definite location of the road in July, 1882. Therefore the tract was not at the date of said definite location “free from pre-emption or other *claims*, or *rights*,” as required to be under the granting act in order to make it available for the company.

Holmes claimed the land, and, under the Burt decision, he had a right thereto, to wit, the right of purchase under the act of 1880. Such right was under the terms of the granting act sufficient to except it from the grant to the company.

This being true, the railroad company is eliminated. No other rights have intervened. The question is now one solely between Holmes and the government, and in my judgment he is clearly entitled to such favorable action as will secure to him the benefits of his original entry and of his improvements made thereunder. His entry as originally made should therefore be re-instated, and as his final proof covered the entire one hundred and sixty acres, patent should issue accordingly.

You will call upon him to surrender his patent, which it appears was issued in August, 1881, for the eighty acres in the even section, in order that one patent may issue for the entire one hundred and sixty acres, embracing that already patented, together with the eighty acres in the odd section, which he claims and which is a part of the tract covered by his original entry.

RECOGNITION OF ATTORNEYS—GENERAL REGULATIONS.

CIRCULAR.*

WASHINGTON, D. C., *February 1, 1886.*

The following statutes relate to the recognition of attorneys and agents for claimants before this Department :

"That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents, or attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims; and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement." (Act July 4, 1884, Stats., vol. 23, p. 101, sec. 5.)

"Every officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any Executive Department of the Government of the United States, or under the Senate or House of Representatives of the United States, who acts as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, aids or assists in the prosecution or support of any such claim, or receives any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall pay a fine of not more than five thousand dollars, or suffer imprisonment not more than one year, or both." (Section 5498, Revised Statutes.)

"It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States, which was pending in either of said Departments while he was such officer,

* Not published in 4 L. D. For departmental circular of September 18, 1884, see 3 L. D., 113. Official order of October 21, 1885, 4 L. D., 220. See also cases of Neil Dumont, 4 id. 55; Luther Harrison, id. 179; and F. M. Heaton, 5 id., 340.

clerk, or employé, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employé." (Section 190, Revised Statutes.)

"Any person prosecuting claims, either as attorney or on his own account, before any of the Departments or Bureaus of the United States, shall be required to take the oath of allegiance, and to support the Constitution of the United States as required of persons in the civil service." (Section 3478, Revised Statutes.)

"The oath provided for in the preceding section may be taken before any justice of the peace, notary public, or any person who is legally authorized to administer an oath in the State or district where the same may be administered." (Section 3479, Revised Statutes.)

The act of May 13, 1884 (Stats., v. 23, p. 22), provides that the oath above required shall be that prescribed by section 1757, Revised Statutes, which is as follows:

"I, ———, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

REGULATIONS.

1. Under the authority conferred on the Secretary of the Interior by the fifth section of the act of July 4, 1884, it is hereby prescribed that an attorney at law who desires to represent claimants before the Department or one of its Bureaus, shall file a certificate of the clerk of a United States, State, or Territorial court, duly authenticated under the seal of the court, that he is an attorney *in good standing*.

2. Any person (not an attorney at law) who desires to appear as agent for claimants before the Department or one of its Bureaus must file a *certificate from a judge of a United States, State, or Territorial court, duly authenticated under the seal of the court*, that such person is of good moral character and in good repute, possessed of the necessary qualifications to enable him to render claimants valuable service, and otherwise competent to advise and assist them in the presentation of their claims.

The Secretary may demand additional proof of qualifications, and reserves the right to decline to recognize any attorney, agent, or other person applying to represent claimants under this rule.

3. The oath of allegiance required by section 3478 of the United States Revised Statutes must also be filed.

In the case of a firm the names of the individuals composing the firm must be given, and a certificate and oath as to each member of the firm will be required.

Unless specially called for, the certificate above referred to will not be required of any attorney or agent heretofore recognized and now in good standing before the Department.

4. An applicant for admission to practice under the above regulations must address a letter to the Secretary of the Interior, inclosing the certificate and oath above required, in which letter his full name and post-office address must be given. He must state whether or not he has ever been recognized as an attorney or agent before this Department or any Bureau thereof, and if so, whether he has ever been suspended or disbarred from practice. *He must also state whether he holds any office under the Government of the United States.*

No person who has been an officer, clerk, or employé of this Department within two years prior to his application to appear in any case pending herein shall be recognized or permitted to appear as an attorney or agent in any such case as shall have been pending in the Department at or before the date he left the service: *Provided*, This rule shall not apply to officers, clerks, or employés of the Patent Office, nor to cases therein.

Whenever an attorney or agent is charged with improper practices in connection with any matter before a Bureau of this Department, the head of such Bureau shall investigate the charge, giving the attorney or agent due notice, together with a statement of the charge against him, and allow him an opportunity to be heard in the premises. When the investigation shall have been concluded all the papers shall be forwarded to the Department, with a statement of the facts and such recommendation as to disbarment from practice as the head of the Bureau may deem proper, for the consideration of the Secretary of the Interior. During the investigation the attorney or agent will be recognized as such, unless for special reasons the Secretary shall order his suspension from practice.

If any attorney or agent in good standing before the Department shall knowingly employ as sub-agent or correspondent a person who has been prohibited from practice before the Department, it will be sufficient reason for the disbarment of the former from practice.

Upon the disbarment of an attorney or agent notice thereof will be given to the heads of Bureaus of this Department, and to the other Executive Departments; and thereafter, until otherwise ordered, such disbarred person will not be recognized as attorney or agent in any claim or other matter before this Department or any Bureau thereof.

L. Q. C. LAMAR,

Secretary.

ATTORNEYS—CIRCULAR OF JULY 31, 1885.

F. M. HEATON.

The requirement of the circular of July 31, 1885, with respect to the appearance of attorneys for alleged fraudulent entrymen is not applicable to attorneys appearing in the General Land Office or this Department.

The case of Wm. E. McIntyre cited and distinguished.

Acting Secretary Muldrow to Commissioner Sparks, January 6, 1887.

On October 4, 1886, F. M. Heaton filed in this Department a letter, inclosing your office letter addressed to him, dated August 23d last, in which he is informed that "your appearance, dated December 15, 1885, in the case of Bertinel V. Pierce, N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of S. $\frac{1}{4}$, Sec. 23, T. 11, R. 71, not having been made in accordance with the circular of July 31, 1885, you are advised that you can not be recognized as an attorney in the case (Wm. E. McIntyre, 4 L. D., 527)."

Mr. Heaton alleges that "said circular was approved by Hon. G. A. Jenks, then acting Secretary, with the distinct understanding that the rules embraced therein applied only to the local land officers, and the fact is so stated in Mr. Jenks' handwriting on a copy of the circular now on file in Division "P," in the General Land Office."

On October 13, 1886, the communication of Mr. Heaton was transmitted to your office, with a request that you return the same with your report upon the allegations therein contained. On November 24th last, your office returned said letter of Mr. Heaton and the circular, with the indorsement of Mr. Jenks above referred to, together with a report containing the views of your office upon the allegations contained in Mr. Heaton's said letter.

That part of the circular of July 31, 1885, (4 L. D., 503), referred to by Mr. Heaton, is as follows: "Attorneys appearing for alleged fraudulent entrymen will be required to file written authority of the claimant for such purpose." Said circular was approved by the Hon. G. A. Jenks, then acting Secretary, and upon the copy of the same, forwarded with said report, is the indorsement by Mr. Jenks that "this rule as to attorneys does not apply to attorneys in the Department, but in the local office." It therefore appears by the construction of the officer approving said circular that it was never intended to apply to the attorneys practicing before your office or this Department. The action of your office, holding that said circular should apply to "attorneys appearing for alleged fraudulent entrymen" practicing before your office, is based upon the case of W. E. McIntyre (4 L. D., 527), decided by me on May 18th last, and your office suggests that, in view of all the circumstances, said indorsement of the Assistant Secretary should not be considered official, and that the necessity of extending said rule to attorneys practicing before your office "becomes more apparent as experience broadens," and there are cited as evidence of the correctness

of said conclusion certain transactions in the practice of attorneys before your office.

Rule of Practice No. 101 (4 L. D., 48), provides that "no person hereafter appearing as a party or attorney in any case shall be entitled to a notice of the proceedings who does not at the time of his appearance file in the office in which the case is pending a statement in writing, giving his name and post-office address, and the name of the party whom he represents." Rule 107 (*ibid.*) also provides that all attorneys, practicing before the General Land Office and Department of the Interior, must first file the oath of office prescribed by section 3478 United States Revised Statutes, and Rule 108 (4 L. D., 336), as amended, provides that "In the examination of any case, whether contested or ex-parte, the attorneys employed in said case, when in good standing in the Department, for the preparation of arguments, will be allowed full opportunity to consult the records of the case, the abstracts, field notes, and tract books and the correspondence of the General Land Office, or of the Department, not deemed *privileged* and confidential."

The case of McIntyre (*supra*) held that the Department had the right under the act of Congress approved July 4, 1884 (23 Stat., 101), to prescribe rules and regulations governing the recognition of attorneys representing claimants, and the requirement that attorneys appearing for alleged fraudulent entrymen must produce written evidence of their authority to act for the claimant. Said decision also held that said circular was not retroactive and could not apply to attorneys who had entered an appearance prior to its date. In said case it appeared that counsel for the purchaser had entered his appearance in the local office prior to the date of said circular, and it by no means follows from said decision that said circular does, or was intended to apply to attorneys practicing before your office.

It must be conceded that the general rule in the courts is that the appearance of an attorney for a party is always deemed sufficient for the opposite party and for the court, unless there are circumstances indicating fraud or collusion.

In the case of *Osborn v. United States Bank* (9 Wheaton, 740), the supreme court of the United States, speaking through Chief Justice Marshall, said: "Natural persons may appear in court, either by themselves or their attorney. But no man has a right to appear as the attorney of another without the authority of that other. In ordinary cases the authority must be produced, because there is in the nature of things no *prima facie* evidence that one man is in fact the attorney of another. The case of an attorney at law, an attorney for the purpose of representing another in court, and prosecuting or defending a suit in his name, is somewhat different. The power must, indeed, exist, but its production has not been considered indispensable. Certain gentlemen, first licensed by the government, are admitted by order of court to stand at the bar with a general capacity to represent all the suitors

in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required. This practice we believe has existed from the first establishment of our courts and no departure from it has been made in those of any State or of the Union."

In the case of *Hill v. Mendenhall* (21 Wall., 454), the same court, Chief Justice Waite delivering the opinion of the court, said: "When an attorney of a court of record appears in an action for one of the parties, his authority in the absence of any proof to the contrary will be presumed." To the same effect has been the ruling in the State courts (see cases cited in U. S. Digest, Vol. 2, p. 340, Sec. 237).

On February 1, 1886,* this Department issued regulations prescribing the qualifications required of attorneys or agents who desire to represent claimants before the Department, or one of its Bureaus. Said regulations provide the manner of admission of attorneys at law and persons not attorneys at law, requiring them to furnish satisfactory evidence that they are of good moral character and in good repute, and possess the necessary qualifications to enable them to render claimants valuable service and otherwise competent to advise and assist them in the presentation of their claims. Said regulations also provide that "unless specially called for, the certificate above referred to will not be required of any attorney or agent heretofore recognized and now in good standing before the Department."

It is not shown or asserted that Mr. Heaton was not recognized by your office and is not now "in good standing before this Department." If it be true, as stated in your report, that in certain cases attorneys have claimed to represent entrymen, "where there is strong evidence to the contrary," then it would seem eminently right that proper proceedings should be instituted to establish the correctness of said charge, to the end that proper action may be had thereon.

The regulations above referred to provide that "whenever any attorney or agent is charged with improper practices in connection with any matter before a bureau of this Department, the head of such bureau shall investigate the charge, giving the attorney or agent due notice, together with a statement of the charge against him and allow him an opportunity to be heard in the premises During the investigation, the attorney or agent will be recognized as such, unless for special reasons the Secretary should order his suspension from practice." Aside from the presumption of honesty that attaches until the contrary is shown, it would seem that a strict enforcement of the regulation quoted would be sufficient to deter dishonest attorneys and agents from appearing in the Department for entrymen or claimants without authority.

* For revised issue of this circular see page 337 of this volume.

Again, it appears that said circular was addressed to the local land officers and special agents. It was not intended to modify the long established practice before your office and this Department, as indicated by the rules above cited. If, however, in any particular case your office has reason to believe that an attorney or agent appears without any authority from the party whom he claims to represent, such attorney or agent may be required to show his authority, and in case of failure so to do, if the evidence warrants it, proceedings may be commenced in accordance with the rules of practice and the regulations of the Department. The attorney or agent entering his appearance in a case should state for whom he appears, and the relation of his client to the case, but there does not appear to be any good reason why all attorneys and agents, "in good standing," practicing before your office and this Department should be required to file the written authority of their clients, before being recognized, in the absence of circumstances impeaching their good faith.

It appearing that Mr. Heaton stated the name of the party for whom he appears, and the land involved, he should be recognized by your office as the attorney of Mr. Pierce, unless there is some good reason to the contrary not apparent in the record.

RAILROAD GRANT—EXPENSE OF SURVEY—INDIAN TITLE.

WHITNEY v. NORTHERN PACIFIC R. R. Co.

The right of the company to land that was in a condition to pass at the date of definite location is not impaired by the failure of the company to pay for the survey.

The effect of such failure is only to raise a question between the government and the company as to the delivery of title.

The sixteenth article of the treaty of April 29, 1868, with the Sioux, did not reserve the lands therein described as lying "north of the North Platte river and east of the Big Horn mountains," but provided that such land should be regarded as unceded Indian territory.

Under the second section of the grant to this company, its rights within such territory took effect on the extinguishment of the Indian title.

Acting Secretary Muldrow to Commissioner Sparks, January 6, 1887.

With your letter of March 19, 1886, you transmit for my consideration the application of Luther J. Whitney for reinstatement of his pre-emption entry of the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 33, T. 8 N., R. 47 E., Miles City district, Montana Territory.

This tract is within the forty mile limits of the line of the Northern Pacific Railroad, and also within the limits of the withdrawal ordered April 21, 1872, upon a map of general route, filed February 21, 1872, and within the limits of the map of definite location filed June 25, 1881. The tract was listed by the company June 23, 1883.

It appears from the records of the General Land Office that on February 27, 1879, Whitney made pre-emption, filing No. 3584, Helena series, for this tract, alleging settlement June 14, 1878, and on August 25, 1879, he submitted final proof and made pre-emption cash entry number 705. May 26, 1880, your office examined this entry and held the same for cancellation, on the ground that as the tract was vacant at the date of the alleged withdrawal, the right of the company attached at that time and the tract was not properly subject to Whitney's entry.

From this decision Whitney appealed, and at the same time filed a motion for reconsideration of said decision and asked that he be allowed to take testimony on the points made by the appeal. He also in said application urged the further ground, that the tract was within the military reservation of Fort Keogh. In passing upon said application your office, by letter of August 4, 1880, declined to reverse its decision of May 26, and decided that the military reservation of Fort Keogh was a temporary reservation, made after the lands had been withdrawn for the benefit of the company, and further that this tract is not embraced in the reservation made by the President's order.

In deciding this case on appeal, both decisions were considered by Secretary Kirkwood, and on March 28, 1881, he affirmed said decisions, and thereupon Whitney's entry was canceled April 6, 1881.

Luther J. Whitney now files his application, praying that the listing and certifying of said tract to the Northern Pacific Railroad Company may be set aside and canceled, and that he may be restored to his former status in reference thereto, alleging in support thereof the same grounds that were in issue and passed upon by the decision of my predecessor of March 28, 1881, to wit: that notwithstanding the withdrawal of said lands by order of April 21, 1872, for the benefit of said company, upon filing their map of general route, yet the Secretary of the Interior erred in holding that the said company had any claim of right or title to said lands at the date of petitioner's settlement, to wit, the 14th day of June, 1878, upon which declaratory statement was filed February 27, 1879, and that the right to said land did not accrue to the company on filing its map of definite location June 25, 1881, by reason of the prior filing of petitioner.

He also alleges the further ground, that the Northern Pacific Railroad Company was permitted to list said tract, among other lands, the 23d day of June, 1883, without having first paid the cost of surveying, selecting and conveying the same.

No other grounds than those above mentioned were urged in the application; but it is also claimed by counsel for Whitney that this tract was from April 29, 1868, until February 28, 1877, included in part of an Indian Reservation, as appears from Article XVI of the Sioux treaty, concluded April 29, 1868 (15 Stat., 635), and so remained in reservation until the treaty with said Indians ratified by Congress Feb-

ruary 28, 1877 (19 Stat., 254), which abrogated Article XVI of the treaty of 1868.

Considering first the grounds stated in this application, and those urged by counsel, that were not considered by my predecessor in his decision of March 28, 1881, do they sustain the prayer of petitioner for a reversal of said decision?

The act of July 17, 1870 (16 Stat., 305), provides that lands granted to the Northern Pacific Railroad Company by the act of July 2, 1864, shall not be conveyed to the company, or any party entitled thereto, "until there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same by the company or party in interest."

While it has been decided by the supreme court of the United States in the case of Northern Pacific R. R. Co. v. Trail County (115 U. S., 600), that under this provision the Northern Pacific Railroad Company has acquired no equitable interest in the lands so granted, which is subject to State or Territorial taxation, before such payment is made into the treasury of the United States, it does not affect the right of the company to insist upon a conveyance to it of such lands as passed under the grant at the date of filing of map of definite location upon paying the cost of such survey. If the land was in a condition to pass to the company under the grant at the date of filing of the map of definite location, its rights were then fixed, and, although the government might retain the legal title in its own hands to secure the payment of those expenses, yet, as expressed by the court in the case cited, "The government is as to these costs in the condition of a trustee in a conveyance to secure payment of money."

Therefore the failure of the road to pay for the survey of this land can not in any manner affect or control this case. If the land was in a condition to pass to the road at the date of definite location the failure to pay for the survey could not impair that right. It is simply a question between the government and the road as to the delivery of title.

You hold "that while the tract held by Whitney was not within the *technical* boundaries of the Indian reservation, yet it was stipulated to be *unceded Indian territory* and so remained until the ratification of the treaty of 1877," which reserved it from the grant.

I can not agree with you in this view.

This tract is embraced within the lands formerly belonging to the Crow tribe of Indians, the Indian title to which was extinguished by a treaty made with them May 7, 1868. By said treaty the land reserved was bounded on the south by the southern boundary of the Territory of Montana, on the east by the 107th degree of longitude, and on the north and west by the Yellowstone river, and said tribe of Indians then relinquished all title, claim or right in and to any portion of the territory of the United States, except such as is embraced within the limits afore-

said. Part of the territory thus relinquished is within the boundaries of the Yellowstone river on the north, the Powder river on the east, the southern boundary of Montana on the south and the 107th degree of longitude on the west, and embraces the land in question. All of these several tracts of land are embraced within the limits of the Territory of Montana. On the 29th of April, 1868, at the same place and by the same Commissioner on the part of the United States, a treaty was concluded with the Sioux tribe of Indians, in which it was stipulated—

“That the following district of country, to wit, commencing on the east bank of the Missouri river, where the 46th parallel of north latitude crosses the same, thence along low water mark down said east bank to a point opposite, where the northern line of the State of Nebraska strikes the river, thence west across said river and along the northern line of Nebraska to the 104th degree of longitude west from Greenwich, thence north on said meridian to a point where the 46th parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto all existing reservations on the east bank of said river shall be and the same is hereby set apart for the absolute and undisturbed use of the Indians herein named . . . and henceforth they will and do hereby relinquish all claim or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.”

Article XI of said treaty stipulates—

“That they (the Indians) will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte and on the Republican Fork of Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase.”

Article XVI then declares that—

“The United States hereby agrees and stipulates that the country north of the North Platte river and east of the Big Horn mountains shall be held and considered to be unceded Indian territory.”

It is insisted upon by counsel that by this article, the country north of the North Platte river and east of the Big Horn mountains, which would include that part of the Territory of Montana in which this land is embraced, was declared to be unceded Indian territory, and so remained until the ratification of the treaty of 1877, which abrogated said 16th article of the Sioux treaty of 1868.

Considering the effect and purpose of said Article XVI in the most favorable light contended for by counsel for Whitney, it could not be construed to mean that the land therein embraced was intended for a reservation, but simply that the Indian title was not extinguished until the treaty of 1877. Therefore, as by the second section of the act granting lands to aid in the construction of the Northern Pacific Railroad, it was provided that the United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the road, the right of the road to this land

under the grant attached when the Indian title was extinguished, whether it was by the treaty with the Crows of 1868, or the treaty with the Sioux of 1877 by which Article XVI of their treaty of 1868 was abrogated.

I do not think however that there can be any question as to when the Indian title to this country was extinguished. From an examination of the treaty, it is clear that all of the lands occupied or claimed by the Crow tribe of Indians within the Territory of Montana, except the reservation therein defined, was by their treaty of 1868 ceded to the United States; and it is equally clear that by the treaty of 1868 with the Sioux Indians all lands occupied and claimed by those Indians, except the reservation therein defined, were also ceded to the United States. "The modification of the general cession of territory in Article II made by Article XI is simply a reserved right of the Indians to hunt on any lands north of the North Platte river, which includes the country between the 104th meridian on the east and the summit of the Big Horn mountains on the west and the North Platte river on the south, and the country occupied by the Crows on the north; and also the right to hunt in southern Nebraska and northern Kansas on the Republican Fork of Smoky Hill river. Article XVI refers exclusively to the territory above described between the 104th meridian and the summit of the Big Horn mountains." *Clark et al. v. Bates et al.*, (1 Dak. Rep., 56).

But the modification of the cession of territory, as contained in the 16th article of the treaty and claimed by the Sioux, and the tract intended to be embraced therein terminates with the southern boundary of Montana. See Maps (General Land Office), 1876.

It will be observed that the country declared to be unceded Indian territory by the 16th article of the treaty of 1868 is not limited by a northern or eastern boundary. If from this fact it is claimed that it therefore embraced the country ceded by the Crows in the Territory of Montana, it might with as much propriety be claimed that it extended to the British possessions on the north and Lake Michigan on the east.

At the date of Whitney's settlement and filing the tract in question had been withdrawn for the benefit of the Northern Pacific Railroad, and under the decision of the supreme court in the case of *Charles W. Buttz, Exr., v. The Northern Pacific R. R. Co.* (119 U. S., 55), Whitney could acquire no rights against the company by such settlement and filing. Besides it appears from an inspection of the record, that no new facts are now alleged or other grounds urged (except those disposed of in this decision) that were not embraced in the former case for this same tract of land, and between the same parties, decided adversely to Whitney by my predecessor in his decision of March 28, 1881. The ground of his claim to this tract was that the company's right did not accrue until the filing of their map of definite location, and that is the same ground urged now.

The question therefore between Whitney and the company has been fully adjudicated, and since said decision the company have filed their map of definite location, to wit, on June 25, 1881, and on June 23, 1883, the land was listed and certified to the company for patent.

For the reasons herein stated, the application of Luther J. Whitney for re-instatement of his pre-emption entry to the tract of land in dispute should be refused.

HOMESTEAD—FINAL PROOF.

FRANCES M. CULL.

Final proof must be submitted on the day fixed in the notice.

The testimony of a witness not named in the notice would not of itself invalidate the final proof.

Acting Secretary Muldrow to Commissioner Sparks, January 8, 1887.

I have considered the case of Frances M. Cull, arising on her appeal from your office decision of October 7, 1885, rejecting her final homestead proof upon the SE. $\frac{1}{4}$ of Sec. 17, T. 105, R. 64, Mitchell district, Dakota.

The rejection of said final proof is based on three grounds:

1. Claimant advertised to make final proof December 22, 1884, but proof was not made until next day.

It is a matter of importance that final proof should be taken on the day originally set, in order that adverse claimants and other parties desiring to assert their own claims or to object to the entryman's proof may be afforded an opportunity to do so. Relative to final proof taken at any other date than that fixed in the published notice, your office circular of March 9, 1885, says (3 L. D., 485):

Such proofs ought not to be accepted by the local officers unless accompanied by most certain evidence of the impossibility of appearance at the time fixed, and the reasons therefor, and then only for the purpose of submission for the consideration of this office. A special report should in such cases be made by the register and receiver, and if proof was advertised to be made before some other officer than the register and receiver, a corroborating affidavit from such officer should be required. This certificate should state whether any person appeared to protest against the proof on the day advertised, and whether any notice, and what notice, of postponement was given.

Mrs. Cull alleges that the reason why she did not appear on the day advertised was because the weather was so severe that her witnesses would not then appear. But there is no report on the subject from the register and receiver, and no corroborating affidavit from the clerk of the district court of Aurora county, before whom the proof was made.

2. The proof was rejected, "the claimant having furnished the testimony of a witness not advertised in the publication of notice."

If there had been two witnesses whose names had been advertised, the testimony of another witness not advertised would have been simply surplusage and would not have invalidated the final proof. In this case only one of the witnesses advertised appeared.

3. Another ground assigned by your office for the rejection of the proof is, the insufficiency of residence and cultivation.

Mrs. Cull claims the benefit of three years' army service by her husband. She first went upon the land December 11, 1882 (when she claims to have established her residence), and remained till December 13 (two days). She then left, and remained away until April 5, 1883. November 30, 1883, she again left, and remained away until some time in March, 1884. She remained on the tract from that date until October 30, when she again left, remaining absent until the day of making final proof—two years, to a day, from the date of entry. When entry is made at the earliest possible time, it invites special scrutiny into the good faith of the entryman. In this case I do not think good faith is shown. I affirm your office decision rejecting claimant's final proof, and requiring new proof be made, in accordance with the regulations of your office, showing compliance with the law until date of making such proof.

TIMBER CULTURE ENTRY—AMENDMENT.

WASS *v.* MILWARD.

Pending decision on an application to amend an entry the claimant should comply with the law.

Acting Secretary Muldrow to Commissioner Sparks, January 8, 1887.

I have considered the case of Albert W. Wass *v.* John Milward, involving timber-culture entry made by the latter for the SW. $\frac{1}{4}$ of Sec. 10, T. 103, R. 59, (Springfield series,) Mitchell district, Dakota.

Milward's entry of said SW. $\frac{1}{4}$ was made March 6, 1879. In August of the same year he applied to amend to the NE. $\frac{1}{4}$ of the same section, as the SW. $\frac{1}{4}$ proved on survey to have a heavy ravine upon it, which before survey, when applicant examined and selected the tract, was not supposed to be thereon. Said application to amend was denied by your office letter of October 26, 1880; but Milward alleges that he was not—at least, not then—notified thereof; and there is nothing upon the record to show that he was.

February 13, 1882, Wass brought contest against the entry; which contest was afterwards dismissed because of not being accompanied with application to enter the tract.

January 29, 1883, Wass filed a new contest, accompanied with an application to enter the tract. April 2, 1883, was the day fixed for a hearing, at which time both parties appeared. The attorney for claimant moved to dismiss the contest, for the reason that the affidavits were

sworn to outside the Territory of Dakota—having been made before a notary public in and for Green county, Iowa. This motion was granted. Claimant appealed to your office, which affirmed the decision of the local officers, June 28, 1883.

Prior to this, however—to-wit, April 2, 1883—Wass had made a new contest affidavit, which he filed in the local office April 30, same year. Hearing in this case was set for July 10, but on that day was postponed until July 30, 1883, when both parties appeared. At that time counsel for claimant moved to dismiss the contest upon several technical grounds, the first being that “at the time the case then on trial was brought, a prior one was pending on appeal before your office, between the same parties, involving the same entry, upon the same charges.” The local office overruled this objection; but your office holds that it was well taken, as “a second contest can not be instituted until the prior one is disposed of, and it makes no difference whether the second one is brought by the former contestant or a third party. *Wheelan v. Taylor*, 2 L. D., 295.”

The doctrine above enunciated was that which obtained when your office decision now under review was written; but it has since been considerably modified (see *Durkee v. Teets* (4 L. D., 99); *Woodward v. Percival* (ib., 234); *Gilbert v. Spearing* (ib., 463); *Melcher v. Clark* (ib., 504); *Brown v. Zeake* (ib., 529); *Churchill v. Seeley* (ib., 589); *Gallagher v. Tarbox* (5 L. D., 231). It is to be noticed, moreover, that Wass’s third contest was not upon exactly the same charge as his second, inasmuch as failure to plant and cultivate is alleged until date of initiation of the third contest, which is a considerably longer period than that covered by the allegation in the case of the second contest.

Wass’s initiation of a third contest is to be considered as a waiver of his appeal from the decision of the register and receiver in the case of his second contest.

I concur with your office in holding that none of the other technical irregularities alleged as error are sufficiently serious to necessitate a dismissal of the (third) contest. The case can therefore properly be considered on its merits.

The testimony taken at the hearing shows that nothing whatever in the way of breaking, planting, or cultivation, was done upon the claim from the date of entry (March 6, 1879, *supra*), until April 26, 1883. Claimant’s excuse for this negligence is, that he was all this time waiting for information from your office relative to its action upon his application to amend his entry (*supra*). He never received any notification from your office or the local office directly; but learned, through a letter from your office to Hon. Thomas Updegraff, and by him forwarded to claimant, that his application to amend had been denied more than two years before.

Claimant alléges that he was informed by Mr. Barber, the receiver—who was yet receiver at the time of the hearing—that “he would not

be required to do any breaking until his application to amend was decided." If this be true, the receiver misinformed him; for local officers have no authority to authorize the violation of the laws of the United States; nor can such violation be excused on the score of misinformation by them. Pending the decision of your office on an application to amend, the claimant should comply with the law. To hold differently would enable a party who desired to violate or evade the provisions of the statute to apply, under any pretext, to amend, and then postpone breaking, planting or cultivation until such time as your office should reach and act upon the application, and notify him of the result.

For the reasons herein given, I reverse the decision of your office, and direct that Milward's entry be canceled.

PRE-EMPTION—RESIDENCE; EVIDENCE.

KNOX v. BASSETT.

Cultivation and improvement cannot be accepted as the equivalent of residence. Evidence is not admissible as to acts performed on the land after the initiation of the contest.

Acting Secretary Muldrow to Commissioner Sparks, January 11, 1887.

I herewith transmit the papers accompanying a motion by the defendant in the case of *Knox v. Bassett*, involving pre-emption cash entry No. 3707, Huron, Dakota, for a review of departmental decision of August 17th last adverse to him.

Said motion and the argument in support of it I have carefully considered, and I fail to find any good reason for granting it. The assignments of error are three, which on examination are reduced to one, to wit, error in holding that the claimant did not establish a residence on the land. Said finding is a conclusion of fact, upon the contradictory evidence produced at the hearing, and was made in conformity to a well-known ruling in relation to the intention of the claimant in going upon the land, which appears in several cases cited in the decision.

The motion before me alleges generally that the decision is "contrary to law," but it fails to point out any statute or ruling which was overlooked. In fact, it quotes from the case of *Grimshaw v. Taylor* (4 L. D., 330) the ruling above mentioned, as properly governing the case. There is therefore no error of law to be considered. Nor is there alleged the omission of any controlling fact, which would amount to an error of fact. The motion, then, rests wholly on the allegation that said finding is "contrary to the evidence." But there is no rule of practice better settled than that enforced in the late case of *Long v. Knotts* (5 L. D., 150), to wit, that a review will not be granted on the allegation that a decision is against the evidence when the evidence is contradictory.

Accompanying this motion is an affidavit by Bassett alleging that "since the hearing" he has done certain things on the claim, to wit, breaking and planting an additional quantity of land; and he asks that said allegations be accepted "as supplemental to the proof" in this case, and "as further evidence of his good faith." This request cannot be granted; for, in the first place, proof of cultivation is in no sense evidence of residence; in the second place, an ex-parte affidavit cannot be admitted to an equality with the testimony of witnesses subjected to cross-examination; and, thirdly, acts done on the land after initiation of contest are incompetent as evidence in the case (*Donly v. Spring*, 4 L. D., 542). It is manifest that a contest raises an issue as to the contestee's *past* compliance with the law in good faith; and to admit as evidence his *future* acts on the land would be incongruous and absurd. Furthermore, it would invite the contestee to manufacture evidence in his own favor, to the great prejudice of an impartial judgment on the actual issue. In the case at bar, the consideration of these allegations in a motion for review would be an equally wide departure from correct principle; because they cover facts arising after the termination of the trial, when both parties had had their day in court and had rested their cases, and when, by the settled rules of law and of Land Department practice (Rule 72), the rights of the respective contestants to the land are to be determined from the evidence submitted.

For the foregoing reasons the motion for review must be denied.

RAILROAD GRANT—STATE SELECTION.

WINONA & ST. PETER R. R. CO.

The informal notation of the words "set aside," opposite the description of a tract of land in an approved list of indemnity school selections, will not be treated as a rejection or cancellation of said selection.

Acting Secretary Muldrow to Commissioner Sparks, January 12, 1887.

On April 22, 1885, E. Peter Bertrand made application to be allowed to enter, under the timber culture laws, the NE. $\frac{1}{4}$ of Sec. 33, T. 109 N., R. 32 W., Tracy land district, Minnesota. His application was rejected, because said tract had been "selected and approved to the State of Minnesota as indemnity school land;" and also because the tract was within the six miles granted limits of the Winona and St. Peter Railroad Company, under act of March 3, 1857 (11 Stat., 195).

From this rejection Bertrand appealed, and on June 15, 1885, you approved the action of the local officers.

You state that the tract in question was "selected by the State May 14, 1863, in lieu of school lands lost in T. 108 N., R. 24 W., and the selection is still intact upon the official records unadjusted."

The map of definite location of the line of the railroad opposite to said tract was filed August 3, 1864, at which time its rights attached, and the land was selected by the company May 23, 1872; and this selection also remains upon the records intact.

In view of this state of facts, in your said decision of June 15, 1885, it is held that "The school selection above mentioned subsisting at the date of the attachment of the railroad rights excepted the land embraced from the grant, and it is a bar to any other selection, filing or entry." And thereupon you held for cancellation the railroad selection and approved the action of the local officers in rejecting the application of Bertrand.

From this action the company alone appealed, and it is insisted in its behalf that there was error in holding that said State selection was subsisting at the date of the attachment of the company's rights.

It is conceded that the State did make selection of the tract as stated on May 14, 1863, but it is asserted that on July 21, 1863, when the Secretary of the Interior approved the list containing said selection, he "set aside"—that is, rejected—the selection of said NE. $\frac{1}{4}$.

An examination of the records in your office shows that opposite to the said NE. $\frac{1}{4}$, on the list approved by the Secretary, are written the words "set aside." By whom this notation was made, or for what purpose, is not apparent. No formal decision has ever been made canceling said selection, nor any action taken to notify the State that the same was "set aside;" and no other lands have been awarded to it in lieu of the tract thus selected. To claim that a selection of proper lands, formally and regularly made, the approval of which has thus informally been suspended, or "set aside," without known cause or proper notice given, is a rejection and cancellation of the same to the conclusion of the State's right thereto, is a contention not based either upon justice or technical law, and will not be further considered.

I therefore concur with you that said State selection, pending at the date of attachment of the railroad grant, excepted the tract in question from the operation of said grant, and I affirm your decision in said case.

HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT.

SNYDER v. ELLISON.

To secure the right initiated by a soldier's declaratory statement, entry, settlement and improvement must follow the filing within six months.

Acting Secretary Muldrow to Commissioner Sparks, January 12, 1887.

I have considered the case of John H. Snyder v. Robert E. Ellison, involving the NE. $\frac{1}{4}$ of Sec. 19, T. 110 N., R. 59 W., Huron, Dakota, on appeal by Ellison from your office decision of December 11, 1884.

On May 17, 1881, Ellison filed pre-emption declaratory statement on the SE. $\frac{1}{4}$ of the said section and town, claiming settlement four days

prior. On September 4, 1882, he also filed soldier's declaratory statement for the tract in controversy. Afterwards on December 14, 1882, he made final proof and cash entry on his pre-emption claim. On January 15, 1883, Snyder made homestead entry of the tract in controversy, and subsequently on February 28, 1883, Ellison also made homestead entry on same tract.

There seems to be some question as to how the hearing in the present controversy was brought about. The register and receiver, in their decision, state that it was "in the matter of the protest of John H. Snyder against the final proof" of Ellison. The correctness of this statement the attorney for Ellison denies and asserts that "said hearing was the result of an affidavit filed by Snyder, but which affidavit did not set out grounds sufficient to warrant a hearing." Whilst making this statement the attorney waives any supposed irregularities in this respect, and submits the case upon the law and facts, as though contest or protest had been regularly made. Neither the said final proof or affidavit alluded to is to be found in the record. But on this waiver of errors the case will be considered as though regularly brought to trial.

The hearing was had before the local officers at Huron on July 29, 1883, at which both parties were present in person and by attorneys. After considering the testimony then submitted, the register and receiver recommended the cancellation of the homestead entry of Ellison, which action was approved by your office.

The decision of the register and receiver and of your office both hold that the soldier's declaratory statement of Ellison filed whilst he held and was residing upon another tract of land, under a pre-emption claim, on which he had not then made, but did afterwards make, final proof, was illegal in its inception, and the homestead entry based thereon must fall, in view of the intervening homestead entry of Snyder.

It is insisted by Ellison, in reply to this, that conceding his disability to hold the premises in controversy by his soldier's declaratory statement whilst living on another tract of land under a pre-emption claim, yet when on December 4, 1882, he made final proof on the latter and received final certificate therefor, his said disability was removed, and with it all bar to the consummation of a homestead entry based on his said soldier's declaratory statement—no intervening right having, at that time, attached to said tract. To sustain this position, *Mann v. Huk* (3 L. D., 452) and *Martinson v. Rhude* (500, *ib.*) and cases therein referred to, are cited.

Had Ellison commenced his "settlement and improvement" upon the tract in controversy before the filing of the intervening claim of Snyder, then his case would have come within the rulings of the cases quoted, and the illegality in his filing, which is conceded by his counsel to have existed, would have been cured. But he did not do this. For, though he made homestead entry within six months after the date of his filing, he did not "commence his settlement and improvement" until after

the expiration of more than six months from said date. Consequently it is unnecessary at this time to determine whether it was incompetent for him to file a soldier's declaratory statement whilst holding another tract under a pre-emption declaratory statement; and whether, if such incompetency existed, it was removed, upon making final proof and cash entry on said pre-emption claim; and his right under said soldier's declaratory statement thereafter was as good and complete as though said incompetency had never existed.

It is true that in regard to this question of settlement Ellison claims that he was prevented from making it sooner, because he could not get lumber to build with in the neighborhood; that when this fact was ascertained, he purchased a shanty near by but was unable to haul it across an intervening creek, because of the ice and high water, until March 17, 1883, and established his residence therein two days later.

A careful examination and consideration of the testimony fails to bear out these statements. The effort to obtain lumber consisted of inquiring—in the latter part of February—for a particular kind of only one firm of dealers, though others were equally accessible. His own witnesses prove that, whilst the creek, spoken of, was at times impassable for teams during February and March, at other times it was easily passable. There is also testimony to show that on another trial of some kind before a justice of the peace, Ellison whilst on oath stated that he commenced his residence on this tract on April 9, not March. Whilst admitting he so swore, he says that he was mistaken at that time. But it is observed that whilst he says he commenced his residence upon the tract on March 19, 1883, not one of his three witnesses or either of Snyder's saw him on the land before some time in June, 1883. Indeed, the testimony satisfies me that from the time he made final proof on December 4, 1882, up to within a short time before contest if he had any home it was at the house of William N. Rogers, one of his witnesses. Indeed, he says himself that he had no fixed home; that he was engaged in an itinerant business, with advertised engagements in different localities away from the land, six days out of the week; and that his time was equally divided between the towns of Huron and Cavour—occasionally stopping with Rogers. When asked to state how much time he lived on the land, his reply was: "I have never kept track of the number of nights. I have been there as much as I could get there. My business has been away" (p. 51, Rec.). The improvements claimed are the shanty, thirteen by fourteen, and an addition ten by ten for a stable, and five acres of breaking. All the testimony on his side as to residence and improvement is of the most meagre and unsatisfactory character; and on the whole evidence I am satisfied that Ellison never established residence upon said tract prior to the beginning of the present controversy. On the other hand, the testimony of Snyder shows that on the opening of the spring he made settlement and commenced improvement upon the tract, breaking and culti

vating between forty and fifty acres of land, built a good comfortable board house, with shingle roof, cellar, well and pump, all worth about \$800, and took up his actual residence, with his family, in the house on July 10, 1883, and has been there since.

I therefore affirm your judgment, and direct the cancellation of the homestead entry of Ellison.

RAILROAD GRANT—DEFINITE LOCATION.

MATTSON v. ST. PAUL M. & M. RY. CO.

Precedence, as against a railroad grant, is accorded a homestead entry made on the day when the map of definite location was filed.

Acting Secretary Muldrow to Commissioner Sparks, January 13, 1887.

The land involved in this case is the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and Lots 2, 3 and 7, Sec. 17, T. 132 N., R. 46 W., Fergus Falls, Minnesota, and is claimed by the St. Paul, Minneapolis and Manitoba Railway Company, under the grant to the State of Minnesota by the act of Congress approved March 3, 1857 (11 Stat., 195), because within the primary limits of its road.

The map of definite location of the road past this land was filed in the Land Office and accepted by the Secretary of the Interior May 10, 1869, and on the same day the tracts here in question were entered under the homestead law by one Edwin A. Knapp, per homestead entry No. 137, which was canceled June 11, 1877.

June 4, 1884, Edwin Mattson applied to file declaratory statement for these tracts, alleging settlement May 7, preceding. This application was rejected by the local office, for the reason that Lots 2, 3 and 7 were claimed by the State under the swamp land grant. From this rejection Mattson duly appealed, and the swamp claim of the State having been finally rejected April 2, 1885, you on the 10th of June, 1885, reversed the action of the local office and allowed the application of Mattson, subject to appeal by the railway company. The company has appealed, and the case is now here for consideration.

It is insisted by the company that its map of definite location was filed in November, 1857, long before the lands in this township were surveyed, and that its right to the odd sections within its primary limits attached on November 9th of that year. To this it is simply necessary to reply that the map here spoken of was not accepted by the land department as a map of definite location farther west than the west line of Range 38—that being as far west as the public surveys extended. In fact, that map has not been considered by the company as its map of definite location, as the records of your office abundantly testify. The rulings of the Department at that time was that the line of road was not definitely fixed within the meaning of the statute, so far as it

passed over unsurveyed land. 1 Lester, 538. This being the ruling of the Department when said map was filed, and the company having acted upon that ruling and afterwards filed another map of definite location, should now be held to abide by its own action.

You rejected the claim of the company, because on the day its map of definite location was filed, the tracts were entered by Knapp under the homestead law. In this I think you were correct. Such ruling is in harmony with that in the case of Bjorn C. Gjuve (1 L. D., 353), wherein it was held that where a pre-emptor settled on railroad land on the same day that the railroad right attached, the land should be awarded to the settler. See also Northern Pacific R. R. Co. v. Parker & Hopkins (2 id., 569). The land having been excepted from the railroad grant by the said entry of Knapp is now public land, and Mattson's application should be received for such of the tracts as are found to be in contiguous form.

Your decision is therefore affirmed.

PRIVATE CLAIM—INDEMNITY SCRIP.

LESSEPS AND LEPRETRE.*

Action as to the issue of indemnity scrip under the act of June 2, 1858, will not be taken except upon the application of one showing an interest therein.

Acting Secretary Muldrow to Commissioner Sparks, January 13, 1887.

In the report of the register and receiver at New Orleans, Louisiana, dated September 5, 1833, the private land claim of Alexander Lesseps, Charles Lesseps and J. B. Lepretre, No. 2, Class B, was recommended for confirmation. American State Papers, Gales & Seaton's Ed., Vol. 6, Public Lands, p. 673.

Pursuant to this recommendation, Congress confirmed the claim by act approved March 3, 1835 (4 Stat., 779).

On the 12th of May, 1883, one E. R. Mason, claiming to represent the heirs of said confirmees, made application to the surveyor-general of Louisiana for a survey and location of the land in place, and if that could not be done, he then requested that indemnity scrip should issue under the act of June 2, 1858 (11 Stat., 294). The surveyor-general held that with the data at hand it would be impossible to locate the claim in place, and also held that scrip should not issue, because the rule in the "Bertrand" case (General Land Office Report for 1879, p. 215) had not been complied with. The decision of the surveyor-general was affirmed by you on appeal April 30, 1885, from which affirmance an appeal is now here for consideration.

There has been nothing filed in your office or here showing who are the legal representatives of the confirmees. There has been filed simply

*See 4 L. D., 443.

a copy of a power of attorney, given by *August Lesseps* to Mr. Mason, authorizing and empowering him to prosecute the claim before the land department, but there is nothing in the record showing that said August Lesseps is in any way related to the original confirmees, or has any interest in the claim under consideration. For this reason, I decline at present to pass upon and consider the merits of this claim; for until it be shown that some one has an interest in it, there is no case before the land department.

When an application shall be made by some one showing himself to be the legal representative of the confirmees or any one of them, and thus entitled to be heard in the premises, the case may be considered anew.

The present application is therefore denied.

PREFERENCE RIGHT OF ENTRY—SPECULATIVE CONTEST.

NEILSON v. SHAW.

A preference right of entry cannot be secured through a contest initiated for the purpose of selling the right of contest, rather than securing the cancellation of the entry.

Secretary Lamar to Commissioner Sparks, October 9, 1886.

I have considered the case of *Simon S. Neilson v. Mrs. Flora E. Shaw*, as presented by the appeal of the former from the decision of your office, dated February 11, 1885, refusing to allow him the preference right of entry of the N. W. $\frac{1}{4}$ of Sec. 12, T. 111 N., R. 61 W., Huron land district, Dakota Territory.

The record shows that one John Dunn made pre-emption cash entry (Sioux Falls series) of said tract on June 30, 1880. On March 16, and May 11, 1882, the local land office transmitted to your office the applications of said Neilson and Shaw to be allowed to contest said entry. On July 15, 1882, your office referred to the report of Special Agent Burke, made September 1880, showing that said Dunn had failed to comply with the law as to residence and cultivation, and advised the local land office that as "*Simon S. Neilson and Flora E. Shaw appear to be contestants in this case and offer to pay the expense of a hearing, and said special agent recommends an investigation, they should order a hearing in the case.*" Pursuant to said letter, notice issued and September 21, 1882, was set for the trial.

Upon the organization of the Huron land district in said Territory, the case was transferred to that office, the land being within that district. Upon the day set for trial, a difference arose as to which party had the preferred right of contest, and the register and receiver decided that Neilson's contest should be tried first, and Mrs. Shaw's contest immediately afterwards, on the same day.

Under date of July 25, 1883, Neilson filed his affidavit duly corroborated, alleging that he had attended the hearing ordered by your office letter of July 15, 1882, on the 21st of September ensuing; that upon that day Mrs. Shaw appeared and claimed a right of contest against Dunn's said entry; that the local land office decided that he had the preference right of contest, and that his case must be heard first, which was done and testimony taken in the presence of Mrs. Shaw; that he is informed by the register that there is no record of any testimony having been given by him and his witnesses on file in the local land office, but that the only record of testimony taken is that of Mrs. Shaw and her witnesses; and he therefore asked to be allowed to substitute the record of his said contest, and that he be allowed a preference right of entry of said tract, as he was then residing upon said land and had valuable improvements thereon, consisting of fifty-five acres of breaking, a two-story house sixteen by twenty feet, with cellar and good well, sixteen feet deep, together with other outbuildings.

On November 8, 1883, your office advised the local land officers that Neilson had the preference right of entry, for the reason that he filed his application to contest said entry prior to that of Mrs. Shaw; that there was no need of another contest, as the testimony submitted by Mrs. Shaw abundantly proved that Dunn's entry was fraudulent, and directed the local land officers to render their decision upon the testimony submitted. On November 27, 1883, the local land officers forwarded the contest papers, and decided that Dunn's entry should be canceled, and the preference right of entry awarded "to the contestant whom these papers show to have a preference right." On April 11, 1884, your office considered the case, and held that the evidence submitted by either contestant was sufficient to warrant the cancellation of said entry, and the same was accordingly canceled by said decision. Your office further decided that Neilson having filed his affidavit of contest first would have the preference right of entry, provided his contest was legal; that it was alleged that Neilson's contest was initiated for speculative purposes, and that he had several other contests pending, which were also speculative. Your office accordingly ordered a hearing to determine which had the legal right of entry. Said hearing was duly held, both parties appearing in person, and were represented by counsel. Upon the evidence submitted the local land officers on January 30, 1885, awarded the right of entry to Neilson. On appeal your office, on February 11, 1885, examined the testimony in the case, found that Mrs. Shaw first settled upon the land; that Neilson's contest was speculative and fraudulent, and that the preference right of entry should be awarded to Mrs. Shaw.

It is strenuously insisted by the appellant that, because he had filed his affidavit of contest first, he should be allowed the preference right of entry under the second section of the act of Congress, approved May 14, 1880 (21 Stat., 140).

While that is true as a general rule, yet it is observed that Neilson's preference right to enter said tract was refused by your office for the reason that his contest was illegal and fraudulent, and hence no bar to the initiation of a legal contest by Mrs. Shaw. It appears that Mrs. Shaw was allowed to proceed with her contest under said decision; that she furnished testimony sufficient to warrant the cancellation of Dunn's entry; that she first settled upon said land and made improvements thereon. The testimony also shows that Neilson stated that he had from four to twelve contests pending at the same time; that he was offering the withdrawal of said contests for sale to different parties; that he tried to negotiate with the brother of Mrs. Shaw for the sale of his claim to said tract; that after the refusal of Mrs. Shaw's brother to purchase his withdrawal of said contest, Neilson moved on the land with his family and began making improvements in the summer of 1883. Mr. Neilson admits that he had three contests against different entries pending at the same time, including the one in the present case.

On December 22, 1882 (9 C. L. O., 186), your office instructed the local land officers at Grand Forks, in said Territory, that "in future you will allow but one contest against a homestead entry, and one contest against a timber entry to the same party at the same time. . . . Fraudulent entries and contests for speculative purposes cannot and will not be allowed by this Department."

On April 9, 1883, your office, in the case of *De Laney v. Bowers* (1 L. D., 189), held that where parties initiate contests, withdraw them before the day of trial, then renew contests, such contests cannot be regarded as made in good faith.

In the case of *O'Kane v. Woody* (2 L. D., 64) this Department quoted that portion of said instructions with approval. See also instructions to Huron Office, September 22, 1884 (3 L. D., 120).

It is true that in the case of *Johnson v. Bishop* (2 L. D., 67), it was held that it may fairly be presumed that all contests are originated for the immediate personal benefit of the contestant, and that the nature of the motive prompting the initiation of a contest would not on the application of a stranger form a proper basis for investigation. But this ruling has been modified in several cases, so as to allow a contest to be attacked for fraud where it was initiated in collusion with the entryman, and where it was commenced, not for the purpose of canceling the entry, but rather to keep the entry of record, and enable the contestant to speculate upon his right of contest. *Brown v. Brown*, and *Moses v. Brown* (2 L. D., 259); *Thorpe et al. v. McWilliams* (3 L. D., 341); *Melcher v. Clark* (4 L. D., 504).

In *Austin v. Norin* (4 L. D., 461), the Department held that although the successful contestant may not have intended to enter the land at the time of filing the contest, yet that will not bar him of the privilege of exercising that right at any time within thirty days from date of notice of cancellation. But it was not intended to rule that a con-

testant, who did not initiate his contest for the purpose of procuring the cancellation of an entry, but rather for the purpose of selling his right of contest to the highest bidder, could secure the preference right of entry by virtue of his fraudulent contest. The underlying principle in the laws for the disposition of the public domain is that every applicant and every contestant in his every act, in endeavoring to secure a tract of public land shall show good faith. Such was the express ruling of the Department in the case of *Dayton v. Hause et al.* (4 L. D., 263).

It appears that Mrs. Shaw first settled upon the tract of land in controversy; that Neilson subsequently settled upon the land and made improvements before the cancellation of Dunn's entry. While neither could acquire any right by virtue of such settlement as against the United States, or the record entryman, yet as between the settlers priority of settlement may be properly considered. *Geer v. Farrington* (4 L.D., 410).

A careful consideration of the whole record discloses no good reason why said decision should be disturbed, and it is accordingly affirmed.

Your attention is called to the fact that on June 26th last Neilson was allowed to make homestead entry No. 11,556 of said tract. It is not understood by what authority that was done, when there was an appeal pending from your office decision awarding the land to Mrs. Shaw. Neilson's said entry should be canceled.

FINAL PROOF—REQUIREMENTS.

GEORGE ROSE.

Final proof must be taken on the day named in the notice, and the testimony of the claimant and his witnesses taken before the same officer.

Acting Secretary Muldrow to Commissioner Sparks, January 14, 1887.

On the 26th of August, 1885, you suspended the pre-emption cash entry of George Rose, covering the NE. $\frac{1}{4}$ of Sec. 8, T. 130, R. 63, Fargo, Dakota Territory, for the reason that the proof was not made in compliance with the published notice of intention to make proof. The published notice of intention announces that "the testimony of witnesses will be taken before Ed. A. Smith, notary public, at Ellendale, Dakota Territory, and the testimony of claimant will be taken before William H. Becker, judge of the probate court at Ellendale, Dakota, on the 28th day of November, 1883."

The testimony was taken on the 24th day of November. As your letter to the local officers very truly says: "This action avoided the very thing sought to be accomplished by the publication of such notice, and deprived interested parties of the opportunity accorded them by law to cross-examine the witnesses, or present counter testimony at the time when proof was offered."

I affirm your decision rejecting said proof. You are directed to notify the local officers to inform the applicant that he will be required to file with the register for publication another notice of intention to make final proof, and then to make proof on the day set forth in the notice—the testimony of the claimant and his witnesses all to be taken before the same officer, in accordance with the practice as laid down in the circular of March 30, 1886 (4 L. D., 473).

PRACTICE—TESTIMONY TAKEN BEFORE A COMMISSIONER.

McKINNEY v. DOOLEY.

Testimony when taken before a commissioner should be sealed up and transmitted to the local office by mail or express.

Testimony thus taken, but delivered to the local office through an attorney for one of the parties, who had the same in his possession for some time, will not be considered.

Acting Secretary Muldrow to Commissioner Sparks, January 14, 1887.

James H. Dooley, on the 9th of July, 1880, made homestead entry of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 138, R. 82, Bismarck, Dakota Territory. Contest was initiated by William H. McKinney March 27, 1884, alleging failure to comply with the law as to residence. The register appointed E. J. Steele (a notary public) a commissioner to take the testimony. On October 3, 1884, the register and receiver rendered decision adverse to claimant. Prior to this date, however,—to wit, August 4, 1884—counsel for Dooley moved to dismiss the contest, on the ground

“That the testimony taken in said cause has been in possession of the attorney for the contestant herein, and that said testimony was delivered to said land office by the attorney for the contestant; and the said contestee objects to the consideration of said testimony, or any part thereof, in said contest.”

Decision being rendered notwithstanding the above objection, claimant appealed to your office, contending that the local officers erred in considering the testimony, “as the fact of said testimony being in the possession of T. J. Mitchell, the said attorney for the contestant, was within the knowledge of said register.” M. J. Edgerly, counsel for claimant, makes affidavit “that said testimony remained in the possession of the said Mitchell until delivered by him to John A. Rea, the register of said land office, as your affiant is informed by the said T. J. Mitchell and the said John A. Rea.”

Your office decision of July 20, 1885, referring to this statement, says: “Nothing is offered in support of this allegation; and I must conclude, though you are silent in regard to the matter, that the case was properly conducted.”

The fact referred to was one which had been persistently urged upon the attention of the register as a reason why he should dismiss the con-

test: upon that point the case was appealed; and when Mr. Edgerly's affidavit that the register had informed him of that fact, which affidavit was sworn to before said register, was transmitted to you by the register, it is safe to assume, in the absence of denial by the register, that the register did so inform him, and that the information was correct. Furthermore: when the attorney for contestant, whose case hinges entirely upon this one point, fails to deny that he informed the counsel for claimant that he had the testimony in his possession for an indefinite time, and that he delivered it to the register, it increases the presumption to an absolute certainty. Under these circumstances, it seems to me hardly correct to hold that "nothing is offered in support of this allegation," and hence to "conclude that the case was properly conducted."

Rule 35 of Practice, paragraph 3 (substantially the same as Rule 30 of those in effect at the date of the hearing in this case), provides that "testimony so taken" (i. e., before any officer other than the register and receiver) "must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof at the local office noted on the papers."

It is of obvious importance in securing the ends of justice that this rule be strictly observed; and there having clearly been a gross violation thereof in the case at bar, and objection having been promptly made, the testimony ought not to have been considered.

I therefore modify said office decision, and direct that a new hearing be had, after due notice to the parties in interest.

PRACTICE—TIMBER CULTURE CONTEST.

ANDERSON v. HAMILTON.

Non-compliance with the law being shown, the burden of proof is thereafter upon the entryman to show his good faith and satisfactory reasons for his failure to meet the requirements of the law.

Acting Secretary Muldrow to Commissioner Sparks, January 13, 1887.

October 23, 1880, David E. Hamilton made timber culture entry No. 1380 of the SW. $\frac{1}{4}$ of Sec. 10, T. 109 N., R. 38 W., 5th P. M., Tracy, Minnesota, and on the 19th of March, 1884, Thomas A. Anderson initiated contest against said entry, the charge being that Hamilton had—"failed during the third year after date of entry to plant in trees, tree seeds, or cuttings, five acres of said tract, and failed to cultivate to crop or otherwise a second five acres of said claim during said third year. There are not to exceed one hundred growing trees on said claim at the present time, and no portion of said claim prepared for the planting of timber during the fourth year after entry."

From the evidence submitted at a hearing duly and regularly had on the 19th of May following, the local officers found that the material charges in the affidavit of contest had been sustained, and they therefore recommended the cancellation of the entry. Upon appeal, you reversed their decision and dismissed the contest by letter of May 1, 1885. From your decision an appeal is brought here.

The evidence shows, and the register and receiver so found, that in June, 1883, the defendant caused to be planted about five acres in trees and cuttings. Nearly all of these failed to leaf out and grow, for the very obvious reason that the ground was not in proper condition for planting, and the season was too far advanced when said planting was done. The tract was not protected, as is the custom of tree growers in that country, and in the fall of that year a fire swept over the tract and destroyed all or nearly all of the trees that grew. So that when contest was initiated, there were but a few trees of any kind or character upon the land—some say not more than ten, others say possibly nearly a hundred.

You hold that the evidence offered to prove no cultivation the third year was inadmissible. In this you erred, as one of the charges in the affidavit of contest was failure to cultivate a second five acres of said claim during the third year of the entry. This charge is sustained by an abundance of testimony, in fact, is not denied anywhere or by anybody.

It is thus seen that the material charges in the affidavit of contest are sustained. There had been no cultivation of a second five acres during the third year of the entry, and there were but few trees, and they of a very inferior character on the claim nearly three and a half years after the entry was made. These being established, the burden of proof is upon the entryman to show his good faith and satisfactory reasons for the evident failure to meet the requirements of the law. This was distinctly ruled by the local officers, and I think correctly, too. *Donly v. Spring* (4 L. D., 542). In this I think the claimant has fallen far short in his evidence. For, as already stated, while the evidence shows that some planting was done, it shows that such work was done when the ground was in no condition conducive to the growth of plants and trees. This is surely no evidence of good faith. It was expressly ruled by this Department, in the case of *Caviness v. Harrah* (4 L. D., 174), that the planting of trees should be done when the ground is in such condition as will, under ordinary circumstances, be favorable to their growth.

Finding the facts as I do, I agree with the local officers in that said entry should be canceled. The decision of your office is therefore reversed.

PRACTICE—HEARING; RELINQUISHMENT.

DEMING v. CUTHBERT ET AL.

It is competent for the Department to investigate and determine whether a relinquishment was executed in good faith, or whether in such matter fraud was practiced upon the government.

Acting Secretary Muldrow to Commissioner Sparks, January 14, 1887.

On the 12th of June, 1878, the local officers at Yankton, Dakota Territory, rendered a decision refusing to allow one John N. Johnson to contest the timber culture entry of one A. R. Wells, for the SE. $\frac{1}{4}$ of Sec. 24, T. 117, R. 53. On December 14, 1878, your office modified said decision of the local officers, and directed that Johnson be allowed a preference right to enter the tract. Long before this, however—to wit, July 30, 1878—the local officers had allowed Charles L. Deming to make timber-culture entry of said tract; and as Johnson took advantage of the preference right allowed him by your office, Deming's entry was held for cancellation by your office letter of February 4, 1879. No formal permission was given Deming to make a new entry, but he seems to have been tacitly allowed to do so; for on the 4th of June, 1880, he made timber-culture entry of the NE. $\frac{1}{4}$ of Sec. 26, T. 123, R. 64 (Watertown series), Aberdeen, Dakota Territory.

On January 13, 1885, Deming's relinquishment of the tract last-named was presented at the land office at Aberdeen, Dakota Territory, whereupon his said entry was canceled, and David S. Cuthbert, on the same date, made timber-culture entry of the same. On learning of this fact, Deming forwards to your office an application for re-instatement of said entry, accompanying his application by an affidavit, in which he asserts that his attorneys, learning that he had had one timber-culture entry canceled, and had afterwards made another, informed him that this was an irregular proceeding and would probably lead him into trouble, but that they would endeavor to have the same "legalized," if he would send them certain documents, among the rest an executed relinquishment; that thereupon affiant did so, solely in order to have his entry legalized, and without the remotest intention of actually relinquishing it; but that after having obtained possession of the document on the pretense above set forth, said attorneys sold it, and pocketed the proceeds. This affidavit is corroborated by that of claimant's brother, and by a third party. All these affidavits affirm, moreover, that claimant has planted and cultivated trees in compliance with law, up to the present time.

You decide that you "see no reason for granting Deming's request, thereby disturbing an innocent party, nor can "your" office undertake to adjust difficulties arising between client and attorney." From your decision claimant appeals.

In my opinion, it is competent for the land department to investigate and determine whether a relinquishment has been made in good faith, or whether the department has been imposed upon by fraud. In the present case the affidavits of the claimant and others present strong *prima facie* proof of fraud; but they are wholly *ex parte*. In order that this Department may take intelligent action in the case, you will direct that a hearing be had, to which all parties in interest, including the attorneys accused of the fraud, shall be cited, to determine whether said Deming relinquished said timber-culture entry in good faith, or whether it was made, as he alleges, "for the purpose of enabling him to make in place thereof a technically legal entry of the same tract under the timber-culture laws."

RIGHT OF PURCHASE UNDER THE ACT OF JUNE 3, 1878.

CUTTEN *v.* ROBLES.

The right of purchase under the act of June 3, 1878, will not be allowed to defeat or impair a prior valid pre-emption claim.

But if the timber applicant show such claim to be invalid it will thereafter constitute no bar to his purchase.

Acting Secretary Muldrow to Commissioner Sparks, January 14, 1887.

On the 12th of March, 1883, Jesus Robles filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of Sec. 12, T. 3 N., R. 1 E., Humboldt land district, California; and on the 21st of September, same year, he filed application to publish notice of intention to make proof for the same on the 20th of October ensuing.

On August 8, 1883, Joseph F. Cutten applied for the land under the act of June 3, 1878 ("For the sale of *timber lands* in the State of California, etc.), and subsequently filed a protest against Robles' being allowed to make proof and payment for the land, alleging that said Robles had not in good faith settled upon, inhabited, or improved said land. Hearing was had December 3, 1883.

As the result of said hearing, the local officers found, as a matter of fact, "that the land in controversy is timber-land, and chiefly valuable for its timber," but reject Cutten's application for the reason that "the filing of the timber application of Cutten was an error, while Robles' pre-emption filing was of record"—citing as authority the case of *Rowland v. Clemens* (2 L. D., 633).

On appeal by Cutten, your office (June 27, 1885) reversed the decision of the local officers; whereupon Robles appeals to the Department.

The testimony is in many respects contradictory beyond reconciling. Robles and his witnesses testify that in March, 1883, he cut logs and laid the foundation for a house; also cut some brush. In June he again

went on the land with the same witnesses, and partly raised the walls of his house; made a small clearing, less than an acre, in the brush; sowed oats on the surface and brushed them in, and planted a few peas. Two of Robles' own witnesses testify that this cultivation appeared to be done only "to comply with the law, and not for a crop." In August Robles again went to the land; finished raising the walls of his house, and partly roofed it, put in a floor of hewed poles, made a door "that was never hung," and put in one small pane of glass. On each of these occasions Robles went to the place one day, stayed all night on the tract, and returned next day. He testifies to remaining all night on the tract twice when no one was with him—making five times altogether, according to his own account, that he visited the tract in the nine months between his settlement and the hearing.

On the other hand, three of Cutten's witnesses, surveyors, testify that they repeatedly, as late as October and December, traveled all over the land, in various directions, *searching* for indications of settlement, but could find no house, clearing, or any indication whatever of inhabitation.

It is furthermore evident from the testimony that the land is chiefly valuable for its timber—competent witnesses estimating that it contains from seven to ten million feet, board measure; and that if the timber was cleared from the land it would be almost or quite valueless for agricultural purposes.

In my opinion, Robles failed to comply with the pre-emption law in respect either of residence, cultivation, or improvement; but that his object was to acquire a valuable tract of timber-land at the price of ordinary agricultural land, rather than purchase it at the increased price of timber land. In the case of *Rowland v. Clemens*, cited by the local officers (*supra*), it was decided that the Department would not allow a timber claim to impair a *prima facie* valid pre-emption claim. But by this it was not intended to hold that an applicant to purchase under the timber-act could not contest the legality of such pre-emption claim; and if as the result of such contest it appeared that the claim were founded in bad faith, and that the pre-emptor had failed in essential respects to comply with the requirements of the law, such filing would be no bar to a timber application—as was directly held in the case of *Showers v. Friend* (3 L. D., 210).

I therefore affirm your office decision holding Robles' filing for cancellation. Cutten's application will remain on file, and he will be allowed to purchase upon giving notice, submitting proof, and in other respects complying with the requirements of the act of June 3, 1878.

PRACTICE—APPEAL—LOCAL OFFICE.

HOTALING *v.* CURRIER.

The local officers have no authority to dismiss an appeal because they deem it defective.

Acting Secretary Muldrow to Commissioner Sparks, January 17, 1887.

I have considered the case of John R. Hotaling *v.* David G. Currier, as presented by the appeal of the latter from the decision of your office, dated June 22, 1885, holding for cancellation his timber-culture entry of the N.W. $\frac{1}{4}$ of Sec. 22, T. 110, R. 62, made March 23, 1880, at the Springfield land office, in Dakota Territory.

It appears that Hotaling filed his affidavit of contest against said entry on July 17, 1883, alleging that the entryman "has failed to break, plant, and protect and keep in a healthy growing condition the timber, seeds, cuttings, or trees required to be planted during the third year after entry, on the first five acres broken on said tract as required by law." On July 27, 1883, Currier filed his application, asking for an extension of time, and alleging that he had complied with the requirements of timber-culture law in good faith; that the trees planted on said claim failed to grow on account of the extreme dry weather and not through his fault or neglect. On December 14, 1883, the local land officers issued a notice for hearing, personal service was made on December 26, 1883, and February 7, 1884, was set for the trial of the case. On the last-named date, attorney for Currier entered a special appearance, and moved "to dismiss said contest upon the ground that the notice of contest herein served upon this claimant does not contain any allegations showing a failure to comply with the timber-culture laws." The register and receiver overruled said motion, and by stipulation of parties testimony was taken before a notary public. Upon the evidence submitted, the local land officers found that the allegations of the contestant were sustained, that "the records do not show that Currier ever filed an application for an extension of time," and they recommended the cancellation of said entry.

Upon appeal, your office, on June 22, 1885, held that the appeal filed by the defendant was defective and should have been dismissed by the local land office, because it did not set forth in specific terms the exceptions to their decision, but that inasmuch as the case was before your office, the evidence was duly considered and the decision of the local land officers was affirmed upon the ground that it was shown that the claimant has failed to comply with the requirements of the law.

The evidence shows that Currier employed an agent to do the breaking, cultivation and planting required by law, and while it is true that the evidence is conflicting as to the amount of work done and the manner of doing the same, yet it is not shown that Currier has acted in bad

faith. Besides, since said case has been transmitted to this Department, there have been filed the ex-parte affidavits of David Whipple and Charles A. Van Horne, tending to show that said Hotaling died on the 12th day of October, 1886. If that be true, I see no reason why said Currier should not be permitted in due time to show full compliance with the requirements of the timber-culture law. *Morgan v. Doyle* (3 L. D., 5).

The rules of practice (Nos. 52 and 53) require the local land officers upon the termination of a contest to forward "their report, together with the testimony and all the papers in the case," to your office, and afterwards they can take no further action affecting the disposal of the land in contest. The local land officers have no authority to dismiss appeals because they may judge the same to be defective.

EXTENSION OF SURVEY IN OREGON.

LAKE WARNER.

The adjustment of conflicting claims should be expedited by the proper extension of the public survey.

Acting Secretary Muldrow to Commissioner Sparks, January 17, 1887.

I have examined your communication of December 16, 1886, together with the report of Special Agent Shackelford, and accompanying papers, relative to the government survey of certain lands in Oregon, bordering on or lying near what is designated on the official plats as Lake Warner.

The lands referred to are represented by the township plat as part of said lake, and the public surveys as closed therefore excluded or omitted them; whereas the special agent reports that much of the so-called lake is dry land, upon which are settlers who desire to claim under the public land laws, while other portions of it are marsh. In fact, his report clearly indicates that there is no lake to be found as located by the government surveys.

The settlers charge that the survey as made was fraudulent and in the interest of certain occupants of lands outside and adjacent to the meander as made. The agent files affidavits of several persons, one a practical surveyor, others settlers, to the effect that much of the land inside the meandered line of the so-called lake is dry land, growing sage and grease wood, and that some of it has been irrigated for the purposes of cultivation. Others, it appears, are claiming the lands as swamp, asserting their title under the State. The settlers can not for the want of survey get their claims of record, and it is stated that the swamp land claimants threaten them with suits in ejectment as trespassers.

You recommend "that the public surveys be extended over the so-called lake in townships 39 and 40 south, ranges 24 and 25 east, or over so much thereof as it is practicable to survey, so that the several claim.

ants to the land may have opportunity to present their claims in the usual manner."

After a careful consideration of the matter as presented, I concur in your recommendation. This, however, relates only to certain lands at and about the south end of the so-called lake. If, as would seem from the special agent's report, there is no lake now and was none at date of original survey, then the conclusion must be that the surveys were improperly closed, and that instead of closing on an imaginary meander they should have been extended to include all of what is by the official plats termed a lake. If, as the agent suggests, and as the data before me seem to indicate, the omission was the result of collusion and fraud, a course should be pursued which will not only correct the error, but will most certainly defeat the efforts to fraudulently secure the use of public land.

Would it not therefore be advisable to extend the surveys not only as recommended by you, but throughout the length and breadth of what is termed Lake Warner, or so much thereof as practicable, and thus throw open for disposal under the public land laws lands for which no claim of record can now be made?

In my judgment such a course should, under the circumstances, be pursued, and if upon further examination you find the facts to be as set out by the special agent, you will direct that the surveys closing on what purports to be Lake Warner be extended, as above indicated, over all the land included within its meandered line.

PRACTICE—ORDER OF PROCEDURE.

UNITED STATES *v.* ROBINSON ET AL.

The appeal, taken on behalf of the entryman as to the order of procedure, having been sustained by the General Land Office the case should have been remanded for disposition under the rules of practice.

Acting Secretary Muldrow to Commissioner Sparks, January 17, 1887.

On the 17th ultimo, John H. Perry, attorney for David G. Robinson, and in his own behalf as transferee, filed in this Department a petition, duly verified, praying that an order issue to your office directing the certification to this Department of the proceedings had relative to the cancellation of pre-emption cash entry No. 833 of the SE. $\frac{1}{4}$ of Sec. 32, T. 124 N., E. 64 W., made by David G. Robinson on January 10, 1883, at the Aberdeen land office, in the Territory of Dakota, and the suspension of all action upon said cancellation by your office until this Department has passed upon the same.

The allegations of the petitioner are that said Robinson made said entry upon the day above stated, after giving due notice by publication; that said final proof showed that the entryman had in all respects

complied with the requirements of the pre-emption laws; that said Robinson, on January 31, 1883, sold said land to said Perry, for the sum of four hundred dollars; that your office on May 12, 1884, upon the report of a special agent, dated December 1, 1883, alleging that said entryman had made said entry fraudulently and sold the land to said Perry, who was fully aware of the fraudulent character of the entry, directed the local land officers to order a hearing, "at which the entryman will be allowed full opportunity to defend his claim;" that your office directed the local land officers to issue due notice and advise the claimant that in default of an appearance, his entry will be canceled; that thereupon a hearing was ordered, and May 11, 1885, was set for the trial of the cause; that on the date last named said Perry appeared specially for the claimant and as transferee, and offered two motions, (1) to dismiss for want of proper service, and (2) that the government be required to offer its evidence first; that both of said motions were overruled by the register and receiver, and an appeal duly taken; that your office on June 12, 1886, advised the local land officers that their action in overruling the motion to dismiss was correct, but that the last motion should have been granted upon the authority of *George T. Burns* (4 L. D., 62); that in accordance with the provision of circular approved July 31, 1885, (4 L. D., 503), which was subsequent to the date of the *Burns'* decision (*supra*), said entry was held for cancellation on said special agent's report, and the local land officers were directed to advise the claimant that he would be allowed sixty days within which to apply for a hearing to show cause why his entry should be sustained, in accordance with said instructions of July 31, as amended May 24, 1886 (*id.* 545).

It is further alleged that your office on September 2, 1886, referring to their letter of August 13, 1886, transmitting the written refusal of the claimant to apply for a hearing, and claiming that said cash entry was duly and legally made, and that your office has no power to cancel the same, advised the local land officers that "your office has jurisdiction in any case prior to the issuance of patent, and upon proof showing fraud or illegality may cancel an entry even if certificate has issued," and that as the claimant has had every opportunity to show his good faith and has declined, said entry was therefore canceled and the case declared closed. It is also alleged that the claimant filed in the local land office an appeal from said decisions of your office, dated May 12, 1884, June 12 and September 2, 1886, alleging five separate specifications of error, and that said appeal was denied by your office letter, dated November 20, 1886.

If the allegations of the petitioner, as above set forth, are true, then he is entitled to the relief prayed for. It is alleged that a hearing had been duly ordered, at which both parties appeared, and your office correctly decided that under the decisions of this Department the burden of proof was upon the government, and the correct practice would have

been to have directed the local officers, after due notice to the parties, to proceed with the hearing, in accordance with the rules of practice and the decisions of this Department.

The circular of July 31, 1885, did not change the practice as laid down in the Burns case (*supra*), so far as related to the burden of proof, nor does it apply to parties who had already been duly summoned to a hearing, and whose cases were pending either in the local land office or on appeal.

It is therefore considered that the application be and it is hereby granted, and you are directed to certify the proceedings in said case to this Department, and in the meantime suspend all action relative to the disposition of the land covered by said entry until further advised.

PRE-EMPTION—SETTLEMENT; PRACTICE.

BURNETT v. CROW.

Acts of settlement which do not serve to give notice of the settlers claim are of little consequence under the pre-emption law.

In the disposition of a case the Land Department is not confined solely to the consideration of the questions put in issue by the parties, but may take such action as the facts before it require for the proper protection of the interests of the government.

Acting Secretary Muldrow to Commissioner Sparks, January 17, 1887.

I have considered the case of Walter Burnett v. Joseph B. Crow, administrator of the estate of Stephen T. Ashworth, deceased, on appeal by Crow from your decision, dated July 7, 1885, holding for cancellation the pre-emption filing, No. 5245, made by Ashworth, for the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 19, the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 20, and the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 29, T. 9 S., R. 12 W., Helena, Montana.

Said filing, it appears, was made May 5, 1883, with allegation of settlement May 1, 1883. Burnett made timber culture entry, No. 572, May 5, 1883, for the NW. $\frac{1}{4}$ of said section 29. From the foregoing it will be observed that Ashworth's pre-emption filing and Burnett's timber-culture entry were made on the same day, and that they are in conflict as to the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 29, above mentioned. If Ashworth made a valid settlement May 1, 1883, or at any time prior to May 5, 1883, he had the superior right to the tract in dispute.

It appears, however, that Burnett filed in your office an affidavit, alleging that Ashworth did not make settlement upon said land prior to May 14, 1883, and upon this allegation the register and receiver were by your office letter of November 16, 1883, directed to order a hearing to determine the respective rights of the parties. The inquiry was to be directed to the time and character of Ashworth's settlement.

A hearing was had, the testimony in which was taken before a person designated by the register and receiver, and was transmitted to them

for consideration and action. Upon examination thereof the register and receiver found in favor of the pre-emption claimant.

You reversed that action, and concluded that "any settlement made by Ashworth was not for his own benefit, but in the interest of Joseph B. Crow, who seeing that he could not enter the land sought to make, use of one in his employ to defeat the right of Burnett." You also state that the actual date of settlement by Ashworth is uncertain. As already stated, he alleged settlement May 1, 1883. At this date it appears that he was in the employ of Crow and so continued until August, 1883. He died in October, 1883.

It is also in evidence that at the date of Ashworth's alleged settlement, Crow had the tract in possession and under fence; that on May 3, 1883, he procured the services of a surveyor to survey the land, for which Ashworth afterward filed; that the surveyor thus employed stayed over night with Crow, on the night of said May 3d; that during the evening, along towards ten o'clock, he (Crow) requested said surveyor to make out for him an application to enter the land under the timber culture law. Upon being informed by the surveyor that an application for the tract under the timber culture laws would not be recognized, because the land lay in two different sections, and that he (the surveyor) had that day prepared for Mr. Burnett, the contestant, an application for the tract in question under the timber culture law, Crow immediately withdrew from the room and in another room in his house had a hurried interview with his employee, Ashworth, in the course of which he informed him how matters stood. He then sold him his house on the tract, so he states, and told him if he was active in the matter he could yet file first for the land. Ashworth left Crow's house that night, and the next morning was at Dillon, the county seat of Beaver Head county, to have the necessary papers prepared with a view to filing for the land.

Crow testifies that Ashworth told him he went to the tract on the night of May 3, 1883, and made settlement before starting to make his filing on the morning of May 4th. That he did so seems, in view of all the circumstances, extremely doubtful. It does not appear that in the interview of the night of the 3d anything was said about his going to the land before starting to make his filing. The thing uppermost in mind at that interview seems to have been the necessity for an early filing, for Crow testifies that he told Ashworth that if he was active in the matter he thought he could get to the local office and file first. Besides, even if he had gone to the tract that night before starting the next morning to make his filing, such act could hardly, unless followed by immediate establishment of actual residence, be regarded as settlement within the meaning of the pre-emption law.

One of the objects of settlement is to furnish notice to all comers that the tract settled upon is claimed by the settler. A midnight settlement, followed by departure of the party in a few hours and before day-

light, without leaving any evidence of having been present, is such an act as this Department should be slow to accept as the settlement required by the pre-emption law. Such a course is suggestive of sharp practice, rather than of a purpose to enter upon and claim land in good faith as a *bona fide* settler.

Upon a full consideration of all the facts and circumstances in this case, I am led to the conclusion arrived at by you that Ashworth never made a *bona fide* settlement for his own exclusive use and benefit, but that what he did was not only at the instigation of but in the interest of his employer, Joseph B. Crow.

It certainly is not proven that Ashworth made settlement May 3, 1883. It is not now claimed that he made settlement May 1, 1883, the date originally alleged by him. It may be said, and is intimated, that he being now dead, no better evidence than that already furnished can be adduced relative to his settlement May 3d. This is without doubt true; for acts alleged to have been done in the dark, and at a time and under circumstances which precluded their being observed by others, are not susceptible of proof by the testimony of witnesses. But he who chooses such a line of action takes all the risk which the secrecy of his acts imposes, should it become necessary to affirmatively prove those acts.

It is objected by counsel for appellant that the only question at issue in this case is that as to the date of Ashworth's settlement, and that your decision that the claim was made in the interest of Crow was outside of the issue made by the contest, and was therefore erroneous. This objection is without force. The hearing was ordered, not only as to the time, but as to the character of Ashworth's settlement, and testimony was taken on the issues thus made. Moreover, the Land Department, by virtue of its supervisory authority, maintains the right of the government to take such cognizance of and action on all facts brought before it in any case as may be necessary to a proper protection of its interests. *Smith v. Brandes* (2 L. D., 95).

Your decision is affirmed.

SWAMP LANDS.—ACTION TO VACATE CERTIFICATION.

STATE OF OREGON.*

The certification of the list in question appearing to have been procured through the fraudulent action of the government agent charged with the examination of the land, the State is directed to show cause why said certification should not be revoked.

Secretary Lamar to Hon. Z. F. Moody, governor of Oregon, January 20, 1887.

On the 22d day of December last I addressed a communication to your predecessor in reference to swamp lands certified to the State of Oregon, embraced in list No. 5.

* See pages 31 and 300 of this volume.

This communication was in reply to a letter from Governor Moody, complaining that the special agent, appointed to make examination of the swamp lands of Oregon, was still investigating the character of the lands embraced in said list No. 5, and the conduct of R. V. Ankeny, a former special agent of the department, in connection with the report of said list for certification.

In reply thereto, attention was called to the fact that such investigation was expressly authorized by my letter of August 7, 1886, for the purpose of determining whether evidence existed to support the charge that the approval and certification of this list was obtained through the fraudulent conduct of the former special agent charged with the duty of making an examination of these lands, and of others conspiring with him for that purpose.

The result of that investigation has been presented to me in the report of Special Agent Charles Shackelford, with accompanying affidavits, which shows that Special Agent R. V. Ankeney never examined certain lands embraced in said list No. 5; that at the time of the alleged examination of said land he was confined to his bed with a broken leg; that upon December 23, 1881, said Ankeney made a corrupt contract in writing with H. C. Owen, the principal claimant of these lands under the State, whereby he, Ankeney, was to receive a large sum of money out of the proceeds of the sale of said land; that this contract was made before Ankeney reported upon the land in question, his report bearing date December 26, 1881; that these reports were falsely and corruptly made, and the approval of the list by the Secretary of the Interior was procured by means of bribery and corruption of said Ankeney, and that a large part of the lands, reported for approval as swamp and overflowed, are not and never have been swamp and overflowed lands within the meaning of the grant.

In view of the above charges, I deem it my duty to require the State of Oregon, through its agents, to show cause on or before Monday, the 18th day of April next, why said certificate and approval of list No. 5 should not be revoked and canceled, and why a re-examination of said lands should not be ordered.

The report of Special Agent Shackelford, and all other papers on file in the Department pertaining to said charge, are now subject to inspection by the agents of the State, or any other party or parties in interest. I have directed that a copy of this order be served upon Captain John Mullan, the agent of the State of Oregon residing in Washington.

LANDS SEGREGATED BY MILITARY OCCUPATION.

WILSON DAVIS.

The establishment and occupancy of a cantonment by the military authorities, excludes from entry, prior to the formal order of reservation, the land thus appropriated.

Acting Secretary Muldrow to Commissioner Sparks, January 20, 1887.

I have considered the appeal of Wilson Davis from the decision of your office, dated July 25, 1885, holding for cancellation his pre-emption cash entry No. 105 of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, T. 47 N., R. 8 W., N. M. Meridian, made October 2, 1883, at the Gunnison land office, in the State of Colorado, so far as the same conflicts with the military reserve, as shown by the supplemental township plat approved July 15, 1884.

The facts appear to be substantially set forth in the decision appealed from, and it is shown that the land in controversy was within the limits of the Ute Indian Reservation, formerly occupied by the White River and Uncompahgre Ute Indians in Colorado, which was declared to be public land of the United States and subject to disposal for cash under existing laws, by act of Congress approved July 28, 1882 (22 Stat., 178).

It appears that the township plat of survey embracing said land was filed on March 23, 1883; that Davis filed his pre-emption declaratory statement for said tracts on July 9, 1883, alleging settlement March 27, 1882, and cash certificate was issued upon his final proof on October 2, 1883. It further appears from the statement in said decision and from an inspection of the records of your office that the land in controversy was occupied by the United States military authorities in 1880 as a cantonment.

In response to an inquiry from your office, the Secretary of War, on November 18, 1882, transmitted the report of the Judge Advocate General relative to the status of the land within the late Uncompahgre Reservation, reported as having been laid off by the military authorities in the Uncompahgre Valley and called the cantonment, in which it was held that by virtue of the treaties made by and between the United States and the Indians, dated October 7, 1863 (13 Stat., 673), March 2, 1868 (15 Stat., 619), and September 18, 1873, said cantonment was properly located on said Indian Reservation; that, although the reservation for the cantonment was not in fact declared by the President, yet the land was in good faith legally appropriated, and therefore segregated from the public domain, and that said cantonment should be considered a military reservation, and the land embraced therein should not be considered subject to disposal as other public lands, under said act.

The Secretary of War concurred in the views expressed by the Judge Advocate General. Your office held that the establishment of said can-

tonment and the occupation thereof by the military authorities, acting under the authority of the Commander-in-Chief, the President, must be regarded as legal, and that the reservation must be considered as established by law, so as to exempt the lands embraced therein from entry under the pre-emption laws.

It is urged that the formal order of the President, declaring said reservation, was not made until after Davis had made his said entry, but that can make no difference, if the land embraced in said entry was in fact included in said cantonment, and the same had been established by law and was in the actual occupation of the military authorities at the time of his said entry, the entry must be considered illegal, so far as it covers land within the limits of the cantonment.

A careful examination of the record discloses no good reason for disturbing said decision, and it is accordingly affirmed.

PRACTICE—REJECTED APPLICATION: HOMESTEAD.

TURNER v. BUMGARDNER.

Information as to the right of appeal not having been given under Rule 66 of Practice, the right of the rejected applicant to be subsequently heard is recognized.

An entry made for the purpose of wrongfully acquiring the improvements of another, and under which settlement could only be consummated by forcible intrusion, confers no right under the homestead law.

Acting Secretary Muldrow to Commissioner Sparks, January 22, 1887.

I have considered the case of George W. Turner v. George W. Bumgardner, involving the SE. $\frac{1}{4}$ of Sec. 12, T. 9 N., R. 10 E., M. D. M., Sacramento district, California.

Bumgardner made homestead entry of said tract April 22, 1884. Turner applied to make homestead entry of the same tract on the 29th of the same month; but his application was rejected because of the prior entry of Bumgardner. October 21, 1884, Turner presented before the local office affidavits alleging settlement prior to that of Bumgardner, and asking for a hearing, which was had December 6, 1884. The local officers rendered joint decision in favor of Turner, and recommended the cancellation of Bumgardner's entry. Bumgardner appealed to your office, which by letter of June 5, 1885, affirmed the decision of the local officers. Bumgardner appealed.

From the record and the testimony the following facts appear:

On April 18, 1884, said Turner purchased from one Burns, for \$400, the improvements on the tracts in controversy, consisting of two dwelling-houses, a barn, and other out-buildings. Turner took immediate possession—turning his horses into the pasture that night, and moving his family and household goods on the 20th. From that date until the

hearing he continued to reside upon and improve the land—repairing and building fences, digging irrigating ditches, setting out fruit trees, grape vines, etc.

On the day after the purchase of the improvements on the tract by Turner, one Noe (who at the hearing was a witness in the case), stated to Bumgardner, who was an engineer in charge of the hoisting works of a mine about a quarter of a mile distant from the tract, the fact of such purchase by Turner. Bumgardner told witness that he wanted that place, and intended to file for it; and two days afterward—April 22—he went to the land office at Sacramento and made homestead entry of the tract.

A few days later Turner forwarded application by mail—which reached the local office April 29—to make homestead entry of the tract. His application was rejected on account of Bumgardner's prior application, and returned by letter.

Thereupon Turner called upon Bumgardner—who lived only a quarter of a mile distant, and whom he regarded as a neighbor and friend—and inquired into the matter. Bumgardner—Turner states in his testimony—“Told me to go on just as if he had not filed upon it; to go on and improve it just the same, and him and me would have no trouble about it.” Turner, being an ignorant man, and apparently understanding that his purchase from Burns gave him some right to the land as well as to improvements, and being informed by his attorney that his priority of settlement would constitute a sure protection against any claim by Bumgardner, took no steps to protect his rights in the premises. The local officers, when they returned to him by letter his homestead application with the information that it was rejected, did not instruct him in the law, nor notify him that he had the right of appeal from their decision.

On the 28th of September, Bumgardner attempted to bring some lumber upon the land to build a house. This Turner at once forbade, and ordered him away. Nevertheless, Bumgardner (as testified to not only by Turner's witnesses but by Bumgardner himself) entered upon the land by force, tearing down the fence to enter the enclosure, and put up a small house, worth (Bumgardner estimates) \$80 or \$100, into which he moved about October 20, again tearing down the fence; as Bumgardner testifies: “He had put it up to keep me out, but I was not going to stay out.” Bumgardner took up his residence in the house just one day before the expiration of six months after making homestead entry.

Bumgardner's appeal is placed upon the ground that Turner—

“Had no right to the land in contest at the date of the institution of such contest by reason of his prior settlement and occupation thereof, he having failed to place his homestead entry therefor of record within the limitation prescribed by statute, or to appeal from the decision of the local officers refusing his application to homestead the land.”

The first question to be disposed of is Bumgardner's right to make homestead entry of the land.

It will be noticed that Bumgardner has no equities in the case, and claims none. He stands on a bare technicality—the fact that Turner, after the rejection of his entry by the local officers, failed to appeal within the time prescribed by your rules.

The case of *Atherton v. Fowler* (96 U. S., 513), although not in all respects parallel to the one at bar, contains much reasoning that is equally applicable herein:

"It is not to be presumed that Congress intended, in the remote region where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In the parts of the country where these pre-emptions are usually made" says the court—and the same is equally true of homestead entries—"the protection of the law to rights of persons and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that Congress has extended a standing invitation to the strong, the daring, and the unscrupulous, to dispossess by force the weak and the timid from actual improvements on the public land."

In *Rector v. Gibbon* (111 U. S., 276), the supreme court, speaking of the system of public land laws as a whole, says:

"Its aim has been to protect those who in good faith have settled upon public land and made improvements thereon, and not those who by violence or fraud or breaches of contract have intruded upon the possessions of original settlers and endeavored to appropriate the benefit of their labors. There has been in this respect in the whole legislation of the country a consistent observance of the rules of natural right and justice."

It was in pursuance of these general principles of right and justice that this Department, in the case of *Johnson v. Johnson* (4 L. D., 158), ruled that "the wrongful act of an entryman, whereby the settlement rights of another claimant for the same tract were not protected by filing or entry, will not be allowed to enure to the benefit of such entryman," adding that "this Department . . . under no circumstances will permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right."

Bumgardner is not in a position to demand the protection of the Department for an entry knowingly initiated in fraud of the rights of a prior settler, and attempted to be consummated through force and lawlessness. And an entry which has been erroneously allowed, or which conflicts with previously acquired rights, is voidable, and upon proper showing may be set aside and annulled (*Wolf v. Struble*, 1 L. D., 457). In my opinion Turner has made such a showing as to justify the setting

aside and annulment of Bumgardner's entry; and I affirm your office decision holding the same for cancellation.

Rule 66 of Practice provides that in case of every rejected application to file upon or enter any of the public lands, the register and receiver shall "promptly advise the party in interest of their action, and of his right of appeal. But in the case at bar the local officers, when they rejected Turner's application to enter, neglected to notify him of his right to appeal." He was thus left in ignorance of the proper course to pursue for the protection of his rights. Therefore in my opinion he ought not to be considered to have lost his right of appeal because of his failure to do so within the time prescribed by the rules of your office.

For the reasons herein given, and in view of the good faith manifested by Turner in fulfilling the requirements of the law as regards residence, improvement, and cultivation, I affirm your decision awarding him the tract in controversy. You will direct the local officers to accept his application.

RAILROAD GRANT—JOINT RESOLUTION OF JUNE 28, 1870.

SOUTHERN PAC. R. R. CO. v. DOOLEY.

A settlement, within the limits of the indemnity withdrawal for the benefit of this company, made prior to the passage of the joint resolution of June 28, 1870, is fully protected thereby.

Acting Secretary Muldrow to Commissioner Sparks, January 20, 1887.

I have considered the case of the Southern Pacific Railroad Company v. Obed D. Dooley, as presented by the appeal of the former from the decision of your office, dated July 29, 1885, allowing Dooley to make homestead entry No. 2655 of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, T. 25 S., R. 29 E., upon which final certificate No. 1695 issued on August 26, 1885, at the Visalia land district, in the State of California.

The record shows that the land in controversy is within the thirty mile, or indemnity, limits of the grant by act of Congress approved July 27, 1866 (14 Stat., 292); that it was ordered to be withdrawn by your office letter, dated March 22, 1867, received at the local land office on May 21, 1867. The township plat of survey was filed in the local land office on August 2, 1879. On October 29, 1879, said Dooley filed his pre-emption declaratory statement No. 6797 for said tracts, alleging settlement on May 1, 1870. On October 30, 1879, Dooley transmuted his filing to said homestead entry, and on April 11, 1885, made final proof after due notice, the company appearing and contesting his right to enter said tracts.

From the evidence submitted the register and receiver found that Dooley was duly qualified to make homestead entry, that, as he settled upon said land prior to May 1, 1870, and had complied with all of the

requirements of the homestead laws, his final proof must be accepted and the claim of the company must be rejected.

The company appealed, and your office, on July 9, 1885, affirmed the decision of the local land office, upon the authority of departmental decisions in the cases of *Langan v. said company* (10 C. L. O., 300), and *said company v. Wiggs*, decided November 27, 1883 (43 L. & R., 146).

The local land office based its decision upon the case of *Tome et al. v. said company*, decided by this Department on August 2, 1878 (5 C. L. O. 85), in which it was held that the lands upon which the grant to said company would operate were not identified until the date of the passage of the joint resolution of June 28, 1870, authorizing the company to construct its road upon the line designated on the map filed in the Interior Department January 3, 1867, and that the rights of all parties who were actual settlers June 28, 1870, were saved.

It is insisted by the company that said decision is erroneous, and if correct should have no application to settlements within the indemnity limits, and that Dooley could acquire no settlement rights on land withdrawn for the benefit of the company. The contention of the company cannot be maintained. The effect of said joint resolution upon the rights of settlers within the limits of said grant was very carefully considered by my predecessor, Secretary Schurz, in the *Tome* case (*supra*), in which he states that "the grant is to be adjusted in the same manner as though the filing of the map in this Department on January 3, 1867, was an act authorized by law, except that the rights of persons who were actual settlers on the 28th of June, 1870, are to be protected." This ruling, based upon the opinion of the Attorney-General (16 Op., 80), has been uniformly followed by this Department.

In the case of *said company v. Rahall* (3 L. D., 321), Acting Secretary Joslyn, on January 17, 1885, approved of the *Tome* decision (*supra*), and said "the ruling in the *Tome* case has been uniformly followed by this Department, and I see no good reason for changing it in the present case."

It must be remembered that the land in controversy is within the indemnity limits of said grant; that the right of the company attaches to the odd numbered sections, within said limits, by selection; that no selection of said tract has been made by the company, and it would be a strained construction to hold that Congress intended to relieve actual settlers upon lands within the granted limits, and deprive them of their equitable rights, if their settlements were within the indemnity limits. And this Department held in the case of *said company v. McCarthy*, (9 C. L. O., 176,) that said joint resolution saved the rights of settlers upon lands within the indemnity limits of the withdrawal for the benefit of said grant. See also *Fox v. Southern Pacific R. R. Co.* (2 L. D., 558.)

Again, if there is any doubt as to the construction of said resolution, it must be resolved in favor of the government and against the com-

pany. To hold that a settler who has made valuable improvements on the public land and entered the same under the homestead law in accordance with the uniform construction of the law for many years by this Department, must be deprived of his home by a changed construction of the law, is not consistent with any principle of law or equity.

It is unnecessary to consider the question whether the Department had any authority to order a withdrawal of lands within the indemnity limits. It is sufficient for the case at bar to hold that since Dooley was an actual settler prior to and at the date of the passage of said joint resolution his rights were saved thereby, and having shown full compliance with the requirements of the homestead law, his said entry should be passed to patent.

The decision appealed from is accordingly affirmed.

SCRIP LOCATION; RES JUDICATA.

THOMAS B. VALENTINE ET AL.

By the former action of the Department, the right to locate Valentine Scrip on this land is now *res judicata* and will not be further considered.

Secretary Lamar to Commissioner Sparks, January 24, 1887.

I transmit herewith the application of Thomas B. Valentine, of San Francisco, California, and David W. Kean, of Chicago, Illinois, for a reconsideration of the departmental decision, rendered by my predecessor, Mr. Secretary Schurz, February 28, 1879 (6 C. L. O., 22), denying the alleged right of said parties to locate Valentine scrip on certain lands lying on the Lake front in the City of Chicago. The decision referred to rested substantially upon the conclusions that the disposition of this land through the action of the War Department in 1839 was final, and not to be inquired into by this Department; and that in any event the lands applied for were not subject to appropriation with Valentine scrip.

It is now alleged as grounds for opening said decision and the re-argument of the whole case, (1) that Secretary Schurz was entirely mistaken in the facts upon which he based his decision. (2) That the decision of Secretary Schurz, in holding that this land had been dedicated to the City of Chicago and was therefore unoccupied public land, was in direct violation of the law, in that it was an attempt to divest the United States of its title to these lands by an executive decision, and thereby usurped the power of Congress to dispose of the public property. (3) That a dedication, if lawfully made, only conveys an easement and not the fee, hence though the City of Chicago may have the use of the land the title thereto yet remains in the government.

This motion could not be entertained, as now presented, even if the reasons urged for such action were in themselves found sufficient, for so far as disclosed by the papers accompanying the motion, no notice of its pendency has been served, or attempted to be served, on the ad-

verse party of record. The case when before the Department formerly came up on the appeal of the City of Chicago from a decision of your office allowing the scrip location, and it is the judgment the Department then rendered, on such appeal, that the motion seeks to re-open. Applications for reconsideration are only entertained after due notice to the opposite party. Rule 76 of Practice.

Again, no reason is given for the delay in applying for a rehearing. Motions for review, except in case of newly discovered evidence, must be filed within thirty days after receiving notice of the decision. (Rule 76.) There is herein no pretense that the facts in the case were not all fairly before the Department when the decision complained of was rendered.

The determination of the case by my predecessor's decision that became final also precludes further action in the matter. The rule in such cases being that a decision by the head of a Department, with certain exceptions, is binding upon his successor, and there is nothing in this case to make it an exception to the general rule.

It is proper to say that since the rendition of the decision now under consideration, it has been followed without exception, so far as I am aware, in all cases of application to locate this scrip within the corporate limits of a city or townsite. Townsite of Seattle *v.* Valentine *et al.* (6 C. L. O., 135). In the case of Merrifield *v.* Illinois Central Railroad Company (9 C. L. O., 219), which involved the location of Porterfield scrip on this same tract, my predecessor, Mr. Secretary Teller, followed the ruling now in question, and held that the land was not subject to such appropriation. Again, on the application of John Farson, to locate Valentine scrip on this tract, the Department adhered to its former rulings, and rejected the application (2 L. D., 338).

It is therefore apparent that, aside from any objection as to the want of formality attendant upon the present petition, the question raised thereby is no longer a proper subject for adjudication by the Department, as the status of this land, under this and other cases, is now *res judicata*. For the reasons assigned, the motion is denied.

*PUBLIC LAND STRIP—RAILROAD RIGHT OF WAY.***CHICAGO, KANSAS & WESTERN R. R. CO.**

The lands embraced within the "public land strip" are subject to the operation of the act of March 3, 1875, granting the right of way to railroads through the public lands.

Said act does not require a railroad company, duly organized under the laws of a State, to file proof of such organization under the laws of every State and Territory through which the road may pass.

But as said land has never been attached to any land district the provisions of the act requiring a profile of the road to be filed in the local office cannot be complied with, and a map therefore, of a line located through said lands could not be approved.

Acting Secretary Muldrow to Messrs. Britton & Gray, January 19, 1887.

Your communication of the 5th instant, asking to be advised whether the status of the Public Land strip is such that maps of a located line through the same can be approved under the general right of way provided for by the act of March 3, 1875 (18 Stat., 482), was referred to the Commissioner of the General Land Office, who has made report thereon, copy of which I herewith enclose. The inquiry is made in the interest of the Chicago, Kansas & Western Railroad Company, a corporation organized and existing under the laws of Kansas.

I am of the opinion that the lands embraced in the territory known as the "Public Land strip" are public lands of the United States, and are subject to the operation of the act of March 3, 1875, granting the right of way to railroads through the public lands of the United States. I am also of the opinion that the act of March 3, 1875, grants the right of way through the public lands to any railroad company, organized by the Congress of the United States or any State or Territory, except the District of Columbia, and that a company organized under the laws of any State is not required to file proof of organization under the laws of every State and Territory through which it may pass to secure the right of way granted by that act.

But the fourth section of said act provides, "that any railroad company desiring to secure the benefits of this act shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

As the "Public Land strip" has never been attached to any State or Territory, or to any land district giving it jurisdiction over said lands,

the provisions of the act could not be complied with, and for this reason I think the status of the land is such that a map of located line through the same cannot be approved.

PRACTICE—CONTEST—MORTGAGEE.

HEGRANES v. LONDON.

A new hearing will not be accorded the mortgagee of an entry, canceled on contest, unless it is clearly shown that the former proceedings were irregular or that the evidence then submitted was false and unreliable.

Acting Secretary Muldrow to Commissioner Sparks, January 29, 1887.

By letter of February 6, 1883, your office ordered a hearing upon the application of Carl Hegrane to contest the homestead entry No. 1740, February 18, 1881,—cash entry No. 4000, June 15, 1882,—of Haaken London, embracing the NW. $\frac{1}{4}$ of Sec. 24, T. 157 N., R. 53 W., Grand Forks, Dakota Territory, the charge being that London had never resided upon his homestead entry prior to making final proof.

Pursuant to said order, after due notice, hearing was set for July 20, 1883, at which date the entryman failed to appear, but sent a telegram that he was sick and unable to attend the trial on that day. It being made to appear, however, that said telegram was false, and that claimant instead of being sick was simply intoxicated, the register and receiver refused a continuance and contestant submitted his testimony. A continuance until August 2 was then ordered upon application of contestant, and the entryman duly notified thereof. Upon said adjourned day, contestant again appeared, but claimant again failed to appear, whereupon the register and receiver considered the testimony already submitted, found therefrom that said entry was fraudulent, and therefore recommended its cancellation. From this decision (date not given) no appeal was filed, but the case still remained at the local office.

Some time in September following, London died intestate, leaving no known heirs, and on January 28, 1884, upon the application of George W. Gilbert, administrator of his estate, the local office ordered a further hearing in the case, without thinking it necessary to notify contestant of such action, and hearing was appointed for March 11, 1884. On said date contestant moved that the administrator be required to show that he was entitled to a rehearing as no notice of the application therefor had been given him. This motion the local office denied, and thereupon both parties submitted testimony. Upon consideration of this latter testimony the local officers by decision of June 20, 1884, found, that claimant had never resided on the land as required by the homestead

law, but that inasmuch as the contestant desired to drop the case, they recommended that the contest be dismissed, "as more injustice is likely to result to the estate of the entryman by the cancellation than benefit to the government by such action."

No appeal from this decision was taken, and the whole case was then transmitted to your office, which by decision, dated April 28, 1885, agreed with the local officers in that the evidence showed a total failure on the part of the entryman to comply with the homestead law in the matter of residence upon his claim, but disapproved of their recommendation that the contest should be dismissed, and accordingly held the entry in question for cancellation. From this decision an appeal was brought here, and the case has been given a careful examination.

Since the decision appealed from was rendered, to wit, July 15, 1885, there was filed in the local office the petition of one E. S. Winslow, representing himself to be a *bona fide* mortgagee for value, of said tract, without notice of any defect in London's title. In this petition Winslow alleges that he had no notice of the foregoing proceedings at the time they were had, and asks, inasmuch as he has foreclosed his mortgage and is now the only party in interest, that another hearing be ordered at which he may be permitted to establish the good faith of the entryman and his compliance with the homestead law.

Waiving whatever irregularities may exist in the proceedings already had, it is clear from the evidence submitted at both hearings that the charges in the affidavit of contest have been sustained. It is shown beyond all question or doubt that the entryman never resided upon the land embraced in his claim prior to making final proof, or at any other time, and your office correctly decided thereon. The contestant has withdrawn from the case; but that does not abate the contest already pending and prosecuted nearly to final judgment. *Taylor v. Huffman* (5 L. D., 40).

As regards the application of Winslow to have another hearing in this case, it is sufficient to say that it must be denied. There have been two hearings in the case already, one of which was had after due notice to the entryman, and the other upon the application of the administrator of his estate, and the evidence submitted at both hearings shows clearly that said entryman never complied with the law. The mortgagee is simply a claimant under the entryman, and before he is entitled to be heard in the premises, he must make it appear by something more potent than his own uncorroborated and unsworn statement that said hearings were irregular in some respect, or that the evidence then adduced is false and untrustworthy. This he has not done.

The decision appealed from is affirmed.

PRACTICE—REVIEW; SPECULATIVE CONTEST.

NEILSON *v.* SHAW (ON REVIEW).

If the evidence is such that fair minds may reasonably differ as to the conclusion to be drawn therefrom, a review of the former decision will not be granted on the ground that it is not supported by the evidence.

Acting Secretary Muldrow to Commissioner Sparks, January 29, 1887.

Simeon S. Neilson, by his attorney, has filed a motion for review and revocation of departmental decision, dated October 9th last (5 L. D. 358), in the case of said Neilson *v.* Flora E. Shaw, involving the NW $\frac{1}{4}$ of Sec. 12, T. 111 N., R. 61 W., Huron, Dakota Territory.

Said decision affirmed that of your office, dated February 11, 1885, and awarded the tract specified to Mrs. Shaw under her right as a preferred contestant, the question at issue being as to which of the parties herein should be considered as the first *bona fide* legal contestant.

* * * * *

The departmental decision herein complained of found the facts substantially as your office had done and likewise came to the same conclusion in the matter of the preference right of contest; citing as authority for such ruling instructions to land officers at Grand Forks, Dakota (9 C. L. O., 186), *Delaney v. Bowers* (1 L. D., 189), *O'Kane v. Woody* (2 id., 64), instructions to Huron office, September 22, 1883 (3 id., 120), *Brown v. Brown* and *Moses v. Brown* (2 id., 259) *Thorpe, et al. v. McWilliams* (3 id., 341), *Melcher v. Clark* (4 id., 504), *Dayton v. Hause* (id., 268), and *Geer v. Farrington* (id., 410); and commenting upon and explaining the cases of *Johnson v. Bishop et al.* (2 L. D., 67), and *Austin v. Norin* (4 L. D., 461). From all which it is apparent that the sole question in the case is as to the legality and validity of Neilson's contest; for if said contest, being the first in point of time, was valid and legal, then as a matter of law he should have the preference right of entry after cancellation of the entry attacked under the act of May 14, 1880 (21 Stat., 140). The decision complained of found it to be invalid, illegal, and fraudulent, in that it was not initiated and prosecuted in good faith, but for speculative purposes.

The motion herein sets up sixteen "reasons" why said decision should be revoked: The first, second, fifth, sixth, seventh, twelfth and sixteenth specifications of error relate to questions of evidence and good faith in the parties herein and attack the findings on those matters in the decision complained of; the third, fourth and fifteenth specifications relate to questions of law, and insist that said decision is in violation of the second section of the act of May 14, 1880, and the settled rules of the land department; and the eighth, ninth, tenth, eleventh, thirteenth and fourteenth specifications relate to the rulings and decisions cited as authority for the conclusion reached in said decision, and insist that

some of said cited decisions and rulings are irrelevant and have no application to the case under consideration, and that others are misapplied.

I have given the evidence a careful re-examination. Much of it is irrelevant and has no bearing upon the question at issue. Much of it is also conflicting, and some of it irreconcilable. But I think it evident that at the time Mrs. Shaw initiated her contest, Neilson had at least three contests pending in his own name, including the one under consideration, and at least two more in the name of one Pickering in which he was interested somewhat, against separate tracts of land. I think it quite evident also that he desired to enter one of the tracts thus contested when the entry covering it should be canceled. He testifies that he from the first intended to enter the tract in question, and that he desired to sell the withdrawals of the other contests or his preference right, in case he procured the cancellation of the original entries; that his purpose always was to enter the tract in question except for a brief time, after Mrs. Shaw had moved upon the claim, when he consented to withdraw his contest for a consideration, but as she was unwilling to pay such consideration, he then went on with his contest and furnished the evidence to procure the cancellation of the original entry. There is, however, evidence to the effect that Neilson was willing to sell the withdrawal of any one of his contests, and that he offered Lyman his choice of any one of five contests, including the one under consideration. Thus leaving it to be inferred that he would sell those for which he could realize the most money and keep for himself one claim, which one he was not particular. While, as already stated, the evidence upon this question is somewhat conflicting, I am not able to conclude from a re-examination of it, that the former finding was absolutely and unconscionably wrong. Granting that the evidence is such that fair minds may reasonably differ as to the conclusion to be drawn from it, yet for this reason, if for no other, I am of opinion the former finding as to the facts should be adhered to.

It thus appears that the withdrawal of this Neilson contest was offered by him for sale *prior* to the time your office ordered a hearing upon the original contest, but that it was never sold, nor even offered for sale *subsequent* to said last-named date, is unquestioned. On the contrary, as abundantly appears from the evidence, when your office, on July 15, 1882, directed a hearing upon Neilson's application to contest, and at all times thereafter he continued to prosecute said contest as rapidly as circumstances would permit, moved upon the land in the early part of the year 1883, and has continued to reside there ever since, his improvements at date of last hearing (August 11, 1884,) being valued at from \$600 to \$1,000. It must be borne in mind, however, that Mrs. Shaw has been living upon the land ever since June, 1882. But inasmuch as each party here appears as a contestant, each must be restricted to rights obtained by the contest. Consequently, the questions of priority of settlement, residence, and improvements do not properly enter into a consideration of this case.

Recurring now to the only real question in the case, viz: the character of Neilson's contest, it is found he had upon several occasions, prior to the date when his application to contest was allowed by your office, offered the relinquishment of it for sale. This fact renders it what was considered in the former decision to be fraudulent and speculative; and in this conclusion I am unable to find error of law. It is true, as suggested by counsel for Neilson, that there is nothing in the statute itself to prevent an individual from contesting as many homestead and cash entries as he may choose to do. Likewise it has been often ruled that the qualifications of a contestant do not enter into the consideration of a contest against a homestead or cash entry. But it must also be remembered that a contest initiated for the purpose of speculation and actually offered for sale is not a contest in good faith, and is therefore invalid. Being invalid, no rights are acquired by virtue of it.

This disposes of the only real question in the case, adversely to Neilson. This contest having been declared to be of no avail, that of Mrs Shaw is allowed to take effect. Having also furnished evidence sufficient to warrant the cancellation of the entry attacked, she should upon paying the land office fees be allowed to enter the land in controversy. The question of improvement, etc., does not enter into a consideration of this case.

It is thus made apparent that there was neither error of fact nor of law in the former decision; and this view of the case renders it unnecessary to discuss the authorities cited in said decision. For, if the conclusion therein was correct, it is a matter of little or no consequence whether the authorities cited support it or not.

For the foregoing reasons, the motion for review and revocation will not be granted, and the former decision is adhered to.

TIMBER TRESPASS.—HOMESTEAD ENTRY.

JOHN T. WOOTEN.

Boxing pine trees on the public lands for the purpose of securing turpentine is an indictable offense under section 2461 R. S.

Such use and disposition of timber, growing on land covered by a homestead entry, cannot be regarded as the "cultivation" required by the homestead law.

Secretary Lamar to the Attorney-General, January 31, 1887.

Herewith I transmit the papers in a case of timber trespass for turpentine purposes alleged against John T. Wooten, of New Branford, Florida, comprising a copy of a letter from the Commissioner of the General Land Office dated the 21st instant, report of special agent Conner of June 22nd, 1886 with accompanying affidavits, letter of agent Conner of June 14th, 1886, letter of late agent Coffman of April 21st 1885, with certain affidavits, and letter of agent Griffin of June 4th 1885.

From these papers it appears that from January 1885 to June 22nd 1886, the date of agent Conner's report, Wooten caused about 26,400 pine trees to be boxed on the lands described, located in townships 6 and 7 south, range 14 east, Florida, gathered therefrom 770 barrels of crude gum which he hauled to his distillery near by and there manufactured into 6,160 gallons of turpentine and 770 barrels of resin, selling the same in Savannah, Ga.

The value of the turpentine is given as 25 cents per gallon, and the resin \$1 per barrel.

Of the lands on which the trees were boxed 160 acres were vacant at the date of the trespass, and 880 acres were covered by homestead entries. It appears that certain of these entrymen came from North Carolina to work for Wooten, who furnished them with money to pay the entry fees.

The gum which came from the trees on these homestead entries was received by Wooten on the following terms: He to pay the entrymen one-third of a cent per season for the products of each box, boxing, and chipping the trees and gathering the gum; or \$2.50 per barrel for the gum at the trees, they to box and chip the trees and do the dipping. In either case he received the gum at the trees and hauled it to the distillery. In answer to the question, "Was the trespass willful?" Agent Conner says, "John F. Wooten knew the character and status of the lands he was boxing and buying gum from." Part of the trees on the homestead entries were boxed by Wooten or by men in his employ, and part of them by the homesteaders, under the contract Wooten made with them to receive the crude gum. All the entries involved have either been held for cancellation, or hearings have been ordered therein. Wooten is represented as financially responsible, and the agent who investigated the case recommends "a thorough enforcement of the law against him."

I concur in the view of the Commissioner that the boxing of trees for turpentine purposes, and the working of a turpentine orchard on a homestead entry is not such a "cultivation" of the land as is contemplated by the second section of the act of 1862. The cultivation contemplated by that act was undoubtedly the preparation and use of the soil for agricultural purposes, whereby the land would be reclaimed from its wild state and be made productive. Said act gives the homesteader a right to occupy the land entered for the purposes of a residence, cultivation and improvement, with a view to making it his permanent home, but it invests him with no right of spoliation, nor does it confer any privilege to use the land for any purposes inconsistent with its use for farming pursuits.

Where homestead entries are covered with timber it is held by this Department that the entrymen have no right to remove the timber from the land faster than is necessary in order to clear it and prepare it for cultivation. To that extent the timber may be appropriated by the entryman, but no further, until he has made proof of compliance with the

requirements of the homestead law, and has received his receipt for the payment of the land office fees.

Such view of, and practice under, the law would certainly forbid the boxing of trees on homestead entries for turpentine purposes, and the working of turpentine orchards thereon. This Department holds that the boxing of trees on the public lands for turpentine purposes is an offense indictable under section 2461 Revised Statutes of the United States, and in this view is sustained by the ruling of Judge Hill, district judge for the Southern District of Mississippi, in the case of *G. S. Leatherberry*, (27 Fed. Rep., No. 8, p. 606). As stated by Judge Hill, the object and purpose of this section is to protect the public timber. The result of boxing pine trees for turpentine purposes is to destroy the timber as effectually as though it were severed from the stump, the only difference being that the boxing process is slower. To hold that thus boxing the trees is not an offense under this section would be going a great way toward defeating the purpose had in view in its enactment. Destroying the trees by boxing is equivalent to cutting them down at once; and using the crude gum for the manufacture of turpentine and resin is employing the timber for a purpose other than for the use of the Navy of the United States.

I cannot see that the method adopted by Wooten to secure the crude gum from the trees upon these homesteads relieved him in any sense of the responsibility attaching to the boxing of the trees or the use of their product. Where he did not box the trees himself or hire some one else to do it for him, he procured it to be done by the entrymen by reason of the agreement made with them; and in either case, whether the gum came from the trees boxed by the homesteader or himself, he entered upon the lands to gather the product of the boxing.

Special attention is directed to the letter of Agent Griffin of June 4th, 1885, which seems to show very clearly that the result of boxing pine trees for turpentine is to destroy them as certainly as though they were cut down, "the only difference being that the boxed tree has a few years to linger while the turpentine gatherer dips its dying flow of sap."

In view of the facts set forth in this case I am of opinion that Wooten is liable criminally for boxing or causing to be boxed the trees involved in the trespass, whether on the homestead entries or vacant public land, as well as civilly for the injury done by the boxing, and for the turpentine and resin manufactured from the gum. I have the honor, therefore, to request that you will cause the papers herewith to be referred to the proper United States attorney, with directions to institute criminal suit against Wooten for his violation of law in connection with the boxing of the trees and the appropriation of the gum, and civil suit against him to recover the manufactured value of the turpentine and resin, and for the amount of the injury done to the trees by the

boxing, as recommended by the Commissioner, if an examination of the facts in the case shall seem to warrant such action and it shall be deemed to be for the interest of the public service.

PRACTICE—CERTIORARI—APPEAL.

MURDOCK *v.* HIGGASON.

The application for certiorari herein, being in effect an appeal, is treated as such, having been filed within the proper time therefor.

Acting Secretary Muldrow to Commissioner Sparks, January 31, 1887.

Oscar Higgason has filed in the Department an application for certiorari in the above stated case, alleging error in the decision of the Assistant Commissioner of December 9, 1886.

It appears from the application, which is verified by the record, that on July 8, 1886, you affirmed the decision of the local officers in favor of the legality of Higgason's pre-emption settlement and filing, with the right to show compliance with the law as to residence and cultivation.

October 5, 1886, a motion was made by Murdock for a reconsideration of said decision upon *ex parte* testimony filed before you alleging fraud and illegality in Higgason's settlement and filing.

November 1, 1886, Higgason filed a motion for a hearing in said case to enable him to introduce evidence to disprove the allegation in said motion for reconsideration, which was refused, and on December 9, 1886, the Assistant Commissioner reconsidered said decision of July 8, and ordered the cancellation of Higgason's filing.

It appearing that the limitation as to appeal has not expired, and also that the petition termed an application for certiorari is in effect an appeal, I think it may without impropriety be termed an appeal and so treated, if he so elect.

HOMESTEAD—COMMUTATION—RESIDENCE.

OSCAR T. ROBERTS.

The right acquired by the original entry is lost, if the entry made on commutation is canceled for the reason that a *bona fide* residence has not been established.

Acting Secretary Muldrow to Commissioner Sparks, February 1, 1887.

This record presents the appeal of Oscar T. Roberts from the decisions of your office, dated June 22 and August 22, 1885, holding for cancellation his commutation cash entry No. 717 of the NW. $\frac{1}{4}$ of Sec. 18, T. 139 N., R. 81 W., made December 18, 1884, at the Bismarck land office, in Dakota Territory. With the final proof appears the explanatory

affidavit of the entryman showing that he was an unmarried man, and in limited financial circumstances; that on the 10th day of June, 1884, he established an actual residence on the land in a house, which he had previously erected thereon; that since that date he has maintained a residence by going upon the land as often as once every two weeks, remaining sometimes over night, and at other times a day and a night, looking after his household goods and superintending his improvements thereon; that during this time he has been engaged in clerical work at Mandan in said Territory, about four and one-half miles distant from said land; that since making said entry and establishing his residence upon said land, as aforesaid, he has always claimed the same as his home to the exclusion of one elsewhere; that he has expended his wages in improving said land, and the improvements have been made thereon to the full extent of his means; that the house built upon said tract has a good, substantial frame, double-boarded, ceiled inside and lined with building paper, and is a good, comfortable residence, furnished with all necessary household furniture; that he has continued to reside on said tract all that was possible for him to do under the circumstances; that he has acted in perfect good faith, and is trying to secure said land for a home and not for the purpose of speculation.

Upon the proof offered the local land officers received payment and issued cash certificate for said land. On June 22, 1885, your office suspended said cash entry, for the reason that the testimony concerning the entryman's absences was indefinite, and the local land officers were directed to notify him "that a supplemental affidavit, duly corroborated, specifying the date and duration, as well as the cause of each absence, is required." Thereupon, Roberts filed a supplemental affidavit as directed, repeated substantially his former statements, and also alleged that he had expended some four hundred dollars in improving said land; that having kept no memorandum, he was unable to state the exact dates or duration of his several absences from the land; that his employment required him to spend the greater portion of his time away from the land, but that he went to the land at least once in two weeks during the entire time prior to making proof and payment for the same; that he has no intention of abandoning said land and still continues to keep up his improvements thereon; and that if the proofs already submitted are not considered sufficient to sustain his entry, then he must lose the land, as he is unable to do anything more.

On August 22, 1885, your office considered said supplemental affidavit, and held that the explanation contained therein was not sufficient to satisfy the requirements of your office, and that said cash entry must be held for cancellation for want of proof showing a "*bona fide* residence" on said tract. Said decision further states "that the rights acquired by his homestead entry still remain intact, the object of this present action being only to insist that before obtaining title to the land, he shall establish an actual residence thereon."

It is clear that if the entryman has never established "*bona fide* residence" on said tract and his entry is for that reason canceled, then the homestead entry must also be canceled. *Greenwood v. Peters* (4 L. D., 237). But the decision appealed from states that "it appears that he (Roberts) made his entry December 10, 1883, but established residence and broke ten acres," thus conceding that the entryman established his residence on the land. There is no concealment by the entryman in his final proof and no evidence of bad faith on his part. Under the circumstances disclosed by the record, the entryman should be allowed to make new proof, showing compliance with the law as to residence, cultivation, etc., within a reasonable time. His cash entry will remain suspended, until such proof is furnished.

The decision appealed from is modified accordingly.

HOMESTEAD AFFIDAVIT—VOIDABLE ENTRY.

ROE *v.* SCHANG.

A homestead entry in which the preliminary affidavit was not made before the clerk of the court in the county where the land is situated, but before the clerk of the court in an adjoining county, is voidable only, and the defect may be cured by proper supplemental affidavit.

Permission to file such affidavit is accorded the defendant herein, as the sufficiency of his original affidavit was not an issue in the contest and his good faith is apparent.

Acting Secretary Muldrow to Commissioner Sparks, February 5, 1887.

I have considered the application of Nelson C. Roe for a review of departmental decision, rendered November 13, 1886, in the case of *Nelson C. Roe v. Quirin Schang*, in which the decision of your office affirming the action of the local land officers in dismissing Roe's contest against Schang's homestead entry No. 5727 of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 8, T. 6 N. R. 66 W., made June 14, 1884, at the Denver land office, in the State of Colorado, was affirmed.

The record shows that Roe initiated a contest against said entry, notice was issued charging abandonment, and testimony was taken before the proper officer on February 19, 1885. Upon the evidence submitted the register and receiver found that the claimant had acted in good faith; that the allegations of the contestant were not sustained, and that the contest should be dismissed. On appeal, your office, on May 26, 1885, affirmed the action of the local land officers and dismissed said contest. Thereupon, the contestant appealed to this Department and the decision of your office was affirmed.

It does not appear that a single issue is raised in this motion that was not presented to the Department when said decision was rendered.

The applicant has appended to his motion certain letters alleged to have been written by the defendant, but it does not appear that they relate to the land in controversy.

The affidavit of contest charged abandonment, change of residence for more than six months and failure to settle and cultivate as required by law, and the notice issued summoned the defendant to answer to the charge of abandonment. There was evidence submitted relative to said charges upon both sides, and since the testimony is conflicting and the decisions of the local land officers, your office, and the Department all sustain the good faith of the entryman, and hold that the contestant has failed to sustain the charges made against said entry, the decision, so far as relates to these issues, must remain unchanged. The motion, however, presents another serious question, which deserves consideration.

The third ground upon which said motion is based is as follows: "It was error not to order the entry canceled, on the ground that it was sworn to before the clerk of the court in and for Larimer county, when in truth and in fact said land is in Weld county."

The affidavit shows that it was executed before the clerk of the district court for Larimer county, Colorado, and it appears that the land in controversy is in the county of Weld.

Section 2294 of the Revised Statutes of the United States provides that, "In any case in which the applicant for the benefit of the homestead, and whose family or some member thereof is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, is prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, it may be lawful for him to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident, and to transmit the same with the fee and commissions to the register and receiver."

In the case at bar, it is not claimed by Schang that any member of his family, other than himself, was residing on said land, hence a strict compliance with said section necessitates the making of the affidavit before the clerk of the court of the county where said land is situated. Said entry is not, however, to be considered void, but rather voidable, capable of being perfected by a supplemental affidavit made before the proper officer. The insufficiency of said affidavit was not put in issue in said contest, nor was it alleged in the appeals from the local land officers or your office. This Department unquestionably has the power to cancel an entry for good cause shown on appeal, even when the cause is not alleged in the affidavit and notice of contest. *Smith v. Brandes* (2 L. D., 95); *Condon v. Arnold* (ibid., 96); *Murphy v. Longley et al.* (4 L. D., 239). But it will be observed that such action is based upon the theory that in all contests the government is a party in interest, and whenever the evidence shows that a party is seeking to acquire title to

the public land fraudulently, the entry will be canceled, even though fraud is not specifically charged by the contestant. *Lee v. Johnson* (116 U. S., 48).

Since it has been decided by the local land officers, your office, and the Department, that the entryman has acted in good faith, and there is no sufficient reason shown for changing that ruling upon that point, there does not seem to be any valid objection to allowing Schang to make a supplemental affidavit before the proper officer curing the defect above indicated. You will therefore direct the local land officers to advise Mr. Schang that he will be allowed thirty days from receipt of notice hereof within which to file said supplemental affidavit.

Said departmental decision is modified accordingly.

RAILROAD GRANT SELECTION—FINAL PROOF.

NYMAN *v.* ST. PAUL M. AND M. RY. CO.

Selection of a tract within the granted limits will not confer title if the land was not granted; but while the selection remains of record entry of the land should not be allowed.

When final proof is offered for land covered by an adverse selection, the party making such selection is entitled to special citation.

Acting Secretary Muldrow to Commissioner Sparks, February 7, 1887.

I have considered the case of Charles Nyman *v.* the Saint Paul, Minneapolis and Manitoba Railway Company, transmitted by your office letter, dated December 10, 1885, in accordance with departmental instructions, dated November 23, 1885.

The record shows that said tract is within the granted limits of said company, and that your office, on February 5, 1885, rejected its claim to the NE. $\frac{1}{4}$ of Sec. 3, T. 117 N., R. 29 W., in the Benson land district, State of Minnesota, for the reason that said tract was covered by homestead entry No. 1111 at the date when the right of the State attached to the odd numbered sections granted, to wit, on March 3, 1865. Fuller made said entry on November 18, 1864, which remained of record until May 1, 1872. On June 5, 1873, Nyman offered his pre-emption declaratory statement for the S. $\frac{1}{2}$ of said quarter section, alleging settlement thereon March 14, same year, and Peter Asp offered to file his pre-emption declaratory statement for the N. $\frac{1}{2}$ of said quarter section, both of which were rejected by the local land officers because of conflict with the right of said company, and the parties duly appealed from said action.

An inspection of the records of your office shows that on May 26, 1880, said company selected said NE. $\frac{1}{2}$ —which your office seems to have overlooked—and the selection was posted on August next ensuing. On November 15, 1883, Nyman made homestead entry No. 11,538 of the N.

$\frac{1}{2}$ and Asp made homestead entry No. 11,539 of the S. $\frac{1}{2}$ of said $\frac{1}{4}$ section, each filing an affidavit alleging that a mistake had been made in the description of the land embraced in his said declaratory statement and that he was actually residing upon the land which he sought to enter. On December 18, 1883, Nyman gave due notice of his intention to make final proof before the proper officers on January 31, 1884, and on the date last named he offered his final proof, showing continuous residence on the land since November, 1873. The proof was accepted, and on March 15, 1884, final certificate No. 6135 was issued thereon. Your office held that since the railroad company had failed to appear at the time and place mentioned in the published notice for making final proof and contest Nyman's right to make said entry, it thereby waived all right to appear afterwards and assert a claim to the land adverse to him. Said decision is based upon the departmental decision in the case of the Atlantic and Pacific Railroad Company *v.* Andrew J. Forrester (1 L. D., 431).

It is strenuously insisted by the company that said decision of your office is erroneous in holding that Fuller's said entry excepted the land covered thereby from said grant, for the reason that the papers show that Fuller, at the time he made said entry, was in the military service of the United States, and it does not appear that his family or some member of his family was at the time residing on the land; and (2) that, as the record shows that said company had made a selection of said quarter section, which was posted upon the records of your office, it was error to hold that the company waived any right by not appearing at the time and place mentioned in the published notice, for the reason that there was no special notice served upon the company to appear at that time and contest Nyman's right to the land.

The record shows several irregularities in the proceedings which should not have been allowed. If, however, it shall appear that said section was excepted from the grant to said company, these irregularities are but errors without injury so far as its rights are concerned.

The contention that Fuller's entry, being intact at the date when the rights of the company attached, did not except the land covered thereby from the grant, cannot be maintained. It has been repeatedly ruled by this Department adversely to the claim of the company and may now be considered well settled. *Hastings & Dakota Railway Company v. Graham* (1 L. D., 380); *St. Paul M. & M. Ry. Co. v. Forseth* (3 L. D., 446); same company *v.* Leech (*ibid.*, 506); *Northern Pacific R. R. Co. v. Urquhart* (4 L. D., 421).

Again, the selection of said company should not have been allowed, on account of the pending appeals from the decision of the local land officers. *St. Paul M. & M. Ry. Co. v. Paulsen* (4 L. D., 232).

The selection could give the company no right to land within its granted limits which had never been granted. When, however, said selection had been allowed and posted upon the records of your office,

the homestead entry should not have been allowed until the selection had been canceled.

The Forrester case (*supra*) is not authority for the case at bar. Where there is a selection of a tract of land of record and a homesteader applies to make proof for the same tract, the party making such selection should be specially cited to appear at the time and place where the final proof is to be offered. Since, however, in this case it appears that said tract was excepted from the grant for the benefit of said company, said selection should be canceled and the entry passed to patent.

The decision appealed from is modified accordingly.

TIMBER CULTURE CONTEST—NOTICE.

RABUCK v. CASS.

The heirs of a deceased entryman are entitled to notice in case of contest against the entry, and the service of such notice must be affirmatively shown by the contestant.

Acting Secretary Muldrow to Commissioner Sparks, February 7, 1887.

On January 6, 1882, William S. Rabuck initiated contest against the timber culture entry of Benjamin F. Cass for the SE. $\frac{1}{4}$ of Sec. 6, T. 111 N., R. 61 W., Huron, Dakota, alleging failure to comply with the law. Hearing was set for October 3d following, and on default of contestant the case was dismissed. Afterwards, by letter of April 7, 1884, on petition of Rabuck your office re-instated said contest. At the date of the re-instatement of the contest, claimant was dead, and accordingly Rabuck filed a supplemental affidavit, dated April 16, 1884, alleging that claimant and his heirs had failed to comply with the law. Notice issued, and service was had by "showing" the writ to the widow of claimant, and leaving a copy of the same at her residence. Testimony on the part of contestant was taken, and the local officers recommended the cancellation of the entry. No appearance was made on behalf of the defense. Your office, by letter of April 9, 1885, reversed the action of the local officers and dismissed the contest. Rabuck appealed.

It is clear that the service of notice was not properly made.

Upon the death of the entryman, the law casts upon his heirs the burden of showing compliance with the law. As a consequence they are entitled to notice of a contest based on want of compliance with the law, and the service of such notice must be affirmatively shown by the contestant. The service is therefore set aside together with all subsequent proceedings. It does not seem necessary however to dismiss the contest, as the error can be cured by a new service, in accordance with law and the rules of practice.

Said decision is accordingly modified.

FINAL PROOF—POSTING NOTICE.

SOUTHERN PACIFIC R. R. CO. *v.* PATRICK BRADY.

Posting notice in the office of the register, of intention to make final proof is an essential, without which such proof cannot be accepted.

Acting Secretary Muldrow to Commissioner Sparks, February 7, 1887.

I have considered the case of the Southern Pacific Railroad Company *v.* Patrick Brady, as presented by the appeal of the company from the decision of your office, dated June 16, 1885, approving for patent Brady's homestead entry No. 323, of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 26 S., R. 33 E., and Lot 3 of SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 18, T. 26 S., R. 34 E., M. D. M., made October 28, 1880, upon which final certificate No. 136 issued April 2, 1883, at the Bodie land office, California, and also rejecting the claim of said company to the tracts in the odd numbered section covered by said entry.

The claim of said company was rejected, for the reason that although the land in question is within the indemnity limits of the withdrawal for the benefit of said company under its grant made by act of Congress approved July 27, 1866 (14 Stat., 292), which became effective on May 21, 1867, yet the company has made no selection of said tracts, and did not appear at the date and place mentioned in the published notice of Brady's intention to make final proof, and contest his right to enter said tracts.

It is insisted by the company that there is no evidence of the posting of the notice of intention to make final proof by Brady in the office of the register as required by law and the regulations of this Department, and that your office has no power to waive a plain requirement of law. But your office held that as the notice of intention was duly published, the presumption must be that the register has done his duty, and since it is "now impossible to obtain a certificate to that effect, owing to a change of officers," the filing of said certificate will be waived.

It is quite clear that if said notice was not posted in the office of the register as required by law, then there was no legal notice given and the company was not bound to appear at the time and place designated for making said final proof. It is not shown that the former register is dead, or that his certificate cannot be procured. The entryman should be called upon to furnish the proper certificate of the register, or furnish satisfactory evidence that the said notice was duly posted, and in case he fails to do so, he should be required to make new proof as required by law.

The decision appealed from is modified accordingly.

ATTORNEYS—RECORDS OF THE LAND DEPARTMENT.

W. H. LAMAR.

An attorney in good standing before the Land Department, prior to filing his appearance in a case, but preliminary thereto, is entitled to inspect the record and all papers upon which action has been taken affecting the rights of the parties.

Acting Secretary Muldrow to Commissioner Sparks, February 8, 1887.

On November 5, 1886, W. H. Lamar, esq., filed in this Department his petition, supported by affidavit, in which he avers that he is an attorney practicing before the courts of this District and the Executive Departments; that on or about the fourth day of November, 1886, he received from W. W. Leek, of Plum Creek, Dawson County, Nebraska, a letter requesting him to examine the record in the matter of the homestead entry of George Tull, number 16572, Grand Island, Nebraska, and to fix the fee for which he would take charge of and prosecute his case; that on said 4th day of November, 1886, he made personal application to you for permission to examine said record, for the purpose of determining whether he would accept a retainer in said case, and if so the amount he would charge; that permission was refused, on the ground that it would be contrary to the rules of the General Land Office to allow him to examine said record. Mr. Lamar alleges that said action of your office was erroneous, because,

First: "That there is no rule of the General Land Office prohibiting such examination of records."

Second: "That it is incompetent for the Commissioner to make a rule which would prohibit such examination."

Third: "That it is the imperative duty of the Commissioner to allow such examination of records for the purpose stated in this case."

On November 6th last, said petition was referred to your office by this Department "for early report," and on January 13, 1887, this Department received the report of your office upon said petition, which is dated December 4, 1886.

By your office letter, dated October 25, 1886, Mr. Lamar was advised that if he desired to appear for said entryman he would have to file the entryman's written authority for such appearance, citing as authority for said ruling the circular approved July 31, 1885 (4 L. D., 503) and the case of McIntyre (4 L. D., 527). Said circular and decision were considered by this Department on January 6, 1887, in the case of F. M. Heaton (5 L. D., 340), referred to in your said report, and it was held that said circular was not intended to and did not apply to attorneys practicing before your office and this Department; that the Department, on February 1, 1886 (5 L. D. 337) prescribed the conditions upon which attorneys-at-law and those not attorneys-at-law may be admitted to practice before this Department, which regulations require "them to furnish satisfactory evidence that they are of good moral character and in good repute, and possess the

necessary qualifications to enable them to render claimants valuable service, and otherwise competent to advise and assist them in the presentation of their claims." It was shown in said decision that the Supreme Court of the United States from Chief Justice Marshall to Chief Justice Waite had invariably held "that the appearance of an attorney for a party is always deemed sufficient for the opposite party and for the court, unless there are circumstances indicating fraud or collusion," citing *Osborne v. United States Bank* (9 Wheaton, 740), and *Hill v. Mendenhall* (21 Wall., 454).

The rules of practice adopted by this Department, in so far as practicable, are framed in accordance with the rules of practice usually established in courts of justice, and it is not apparent why attorneys in good standing practicing before this Department should not be held to the same accountability and be accorded the same privileges as if practicing in the courts of the country.

It is suggested in the report of your office that Mr. Lamar "overlooked Department circular of January 11, 1886 (4 L. D., 336), amending Rule 108 of Practice," and you hold that said circular specifies more distinctly the persons allowed to examine "the records of the case," and also emphasizes the discretionary power of the Commissioner.

Rule 108 of Practice, prior to amendment, provided that, "In the examination of any case, whether contested or *ex parte* and for the preparation of arguments, the attorneys employed, when in good standing in the Department, will be allowed full opportunity to consult the record of the case and to examine the abstracts, plates, field-notes, and tract-books, and correspondence of the General Land Office or of the Department relative thereto, and to make verbal inquiries of the various chiefs of divisions at their respective desks in respect to the papers or status of said case; but such personal inquiries will be made of no other clerk in the division except in the presence or with the consent of the head thereof, and will be restricted to the hours between 11 a. m. and 2 p. m.

Said rule was amended on January 11, 1886, as follows:

"In the examination of any case, whether contested or *ex parte*, the attorneys employed in said case, when in good standing in the Department, for the preparation of arguments, will be allowed full opportunity to consult the records of the case, the abstracts, field notes, and tract books, and the correspondence of the General Land Office or of the Department not deemed *privileged* and *confidential*; and whenever, in the judgment of the Commissioner, it would not jeopardize any public or official interest, may make verbal inquiries of chiefs of divisions at their respective desks in respect to the papers or status of said case; but such inquiries will not be made of said chiefs or other clerks of division except upon consent of the Commissioner, Assistant Commissioner, or Chief Clerk, and will be restricted to hours between 11 a. m. and 2 p. m."

On May 24, 1884, this Department issued the following order:

"Frequent requests are made for permission to examine the records and correspondence in this Department, and its several branches by persons not connected therewith. All its records are public and should be accessible for examination to any reputable citizen for a legitimate object. This should not apply to private claims, caveats, nor pending applications for letters patent. They should not, however, be opened to examination for idle, curious, or malicious ends. It is therefore—

"*Ordered*, That any public record or account in this Department shall be subject to inspection by any reputable person, provided the specific record, subject, or account shall be set forth by such person and the reason given for the desired inspection.

"Subordinate officers of the Department, in determining their action under this order, will exercise their own judgment as to whether any public or official interests in each case would be jeopardized by any such inspection, and, if in doubt, submit the matter for the action of higher authority, together with the reasons for refusal, if any exist.

"It is the desire of the Secretary not to be embarrassed with the deciding of such cases, unless grave objections arise in the minds of subordinates to granting such requests. It should be borne in mind by those who, for the time being, are the custodians of the records and correspondence of their several offices, that they can have no *personal* interest in these matters, and that they are the servants of the public, for the public good."

This order has never been revoked. The circular of January 11, 1886, amending Rule 108, makes no mention of said order of May 24th, and was not intended to change or abrogate it. The amended rule applies to a particular class, to wit, "*attorneys employed*," when in good standing in the Department. Again, attorneys admitted to practice in the courts are officers of the court, and their obligation to be faithful to the court is as binding upon them as their obligation to be true to the best interests of their clients. Bouvier, Vol. 1, 140.

In *ex-parte Garland* (4 Wall., 333), the supreme court of the United States held that "attorneys and counselors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. The order of admission is the judgment of the court that the parties possess the requisite qualifications and are entitled to appear as attorneys and counselors and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court *after opportunity to be heard has been offered*. Their admission and their exclusion are the exercise of judicial power."

The same doctrine was held by the supreme court of California, in the case of *Clark v. Willett* (35 Cal., 534), and also that "an attorney's license is prima facie evidence of his authority to appear for any person whom he professes to represent." See also *People v. Mariposa Company* (39 Cal., 683); *Boston Tunnel Company v. McKenzie* (67 Cal., 485).

The ground upon which Mr. Lamar's said application was rejected by your office is, that he must file the entryman's written authority to appear for him, while in said report the authority for such rejection appears to be amended rule of practice No. 108. Attorneys have always been allowed by the courts to enter a special or limited appearance, and it would seem that attorneys practicing before this Department, in good standing, ought to be allowed to inspect the records of your office, including all papers upon which action has been taken affecting the rights of parties. The mere fact that a case is pending in one division of your office rather than in another can make no difference in the principle. It ought not to be presumed that attorneys of good standing in this Department will disregard their obligations to be faithful to the Department as well as to their clients.

No good reason is shown why an attorney practicing before this Department should have any less privileges than would be accorded to any other reputable person seeking to inspect the records of your office. While it must be conceded that a large discretion should be given to your office, yet that discretion is a legal one and should be exercised in accordance with the regulations of the Department. When, therefore, any attorney practicing before this Department represents that he has been applied to by a party in interest to appear for such party in any case pending in your office, and that he desires to inspect the record of such case to learn the nature thereof and ascertain the amount of fee to be charged for his services in appearing for such party, such attorney should be allowed to inspect the record and all papers upon which action has been taken by your office adverse to the interest of such party.

The application of Mr. Lamar to be allowed to inspect the record in said case is allowed, unless there is some other objection that does not appear in the record before me.

HOMESTEAD—PRE-EMPTION—RESIDENCE; LOCAL OFFICE.

KRICHAUM v. PERRY (ON REVIEW).

As residence is an essential under both pre-emption and homestead law, a claim under each, at the same time, cannot be maintained.

A right in contravention of law cannot be recognized, though asserted as the result of erroneous advice on the part of the local office.

Acting Secretary Muldrow to Commissioner Sparks, February 8, 1887.

I have before me the application filed in behalf of George S. Perry

for review of departmental decision of May 12, 1886, in the case of Elizabeth Krichbaum v. George S. Perry (4 L. D., 517), wherein Perry's homestead entry, No. 6557, of the SW. $\frac{1}{4}$ of Sec. 34, T. 99 N., R. 64 W., Yankton, Dakota, was adjudged illegal and the preferred right of entry was awarded to Krichbaum, the contestant, under section two of the act of May 14, 1880. Perry asks not only a review, but also a rehearing on the following grounds, to wit:

1. Newly discovered evidence material to his defense.
2. Admitted and well known prejudice of the local officers against his attorney who tried the case at the hearing had before them under the contest, which prejudice influenced their judgment, notwithstanding their intention and efforts to act impartially.
3. Applicant was misled by his attorney, and prevented from submitting at the former trial all the testimony material to a full and proper defense.
4. He made the entry in good faith, and can show that when it was made the local officers were fully informed of all the facts, including those which were made the ground of the judgment of cancellation, and that they advised him that said facts constituted no ground of objection to the allowance of his entry.
5. The records of the Yankton office, where his entry was made, show that it had been the practice to allow homestead entries under circumstances similar to those which surrounded this entry. Several cases are cited from said records to sustain this averment.
6. He was wholly ignorant of the record facts above mentioned, until since my said decision of May last, and he asked to be allowed to prove the allegations above set forth.

Your office decision on account of which the appeal was brought held that Perry's homestead entry was illegal and should be canceled, because, at the date thereof, the claimant was living upon his pre-emption claim in an adjoining township, upon which he subsequently made final proof and payment. The departmental decision, a review of which is now asked, affirmed the judgment as above, but modified your office decision to the extent of holding that contestant was entitled to the preferred right of entry under the act of May 14, 1880, notwithstanding the evidence upon which the judgment of cancellation was based was a matter of record in your office.

The case has been very fully argued on the motion for review. The arguments, together with the several grounds presented as reasons why the motion should be granted, have been carefully considered.

The argument last filed in behalf of Perry asks that his entry be reinstated on the facts now of record in this Department.

This renders it unnecessary to consider seriatim the several grounds given in the original motion why a new trial should be had and additional evidence introduced, further than to say that they present to my

mind no reasons which in my judgment would warrant a rehearing of the case for the purpose of taking further testimony.

With a respect to a reconsideration of the case on the record as made, it may here be remarked that in the former decision the evidence taken at the hearing as to Perry's compliance or non-compliance with the law in the matter of residence and cultivation was not taken into consideration in the conclusion then reached.

It appeared that he had made his homestead entry while residing on a pre-emption claim, on which he had not yet made final proof, and as a conclusion of law on this admitted fact it was held that the entry was illegal in its inception, and that for that reason it should be canceled.

The objection made to this in the motion for review is that while it is true that Perry had not made final proof on his pre-emption claim at the date when he made his homestead entry, he was advised by the register and receiver, after their attention had been called to the facts relative to the status of his pre-emption claim, that he could, notwithstanding those facts, legally make the homestead entry, and that having relied on the advice thus given, and having acted thereon, he should be protected in his homestead entry. That he was so advised was denied by the district land officers in an official letter to your office, under date November 7, 1885, after appeal from your office decision adverse to Perry, which had been rendered March 7, 1885.

Subsequently, to wit, July 27, 1886, after the decision, a review of which is now asked, an affidavit was made by G. A. Wetter, late register of the United States land office, contradicting the letter of the local officers, above referred to, and stating that he was register of the Yankton land office at the date when Perry made his homestead entry, and until June 30, 1886; that to the best of his recollection said Perry represented to him and to the receiver the facts as herein stated, relative to his pre-emption claim, and asked if he could then legally make homestead entry; that at that time both he (the register) and the receiver were of the opinion that a party could make a legal homestead entry after having made application and having advertised to make final proof and payment on a pre-emption claim, and that holding such opinion Perry was allowed to make his homestead entry. The affiant making this statement was the register who, in November, 1885, had stated in an official letter to your office that any statement that the entry was allowed as claimed, after the facts in the case had been made known to the local office, is absolutely false. As evidence that the later statement is the truthful one, counsel for Perry cite a list of half a dozen or more cases in which homestead entries had been allowed at the Yankton office, while pre-emption claims of the same parties were pending.

It appears from his citations that two of the homestead entries thus made have been canceled by your office and the fees and commissions refunded to the entrymen. The inference is that those remaining will

receive the same action when reached in the course of business. It is apparent, therefore, that whatever the opinion or practice of the local office at which this entry was made may have been, your office has promptly corrected errors of the character in question whenever the facts were brought to its attention by canceling as illegal homestead entries made under the circumstances indicated.

The contention that Perry's homestead entry should be recognized and treated as valid, because the register and receiver, knowing the facts relative to his pre-emption claim, misled him by allowing his homestead entry, can not be sustained. This Department has no power or authority to legalize an illegal act, even though that act was done with the permission of one of its officers. On the other hand, one of its duties in cases relating to the public lands is to correct errors of law or of fact committed in the local land offices, when properly brought to its attention.

It is therefore clear on the theory on which the motion for review was filed, to wit, that whatever of irregularity or illegality appeared in Perry's homestead entry as made should be excused and condoned because of the part taken in such illegality by the register and receiver, that this Department cannot furnish the entryman any relief. But in an argument recently filed in behalf of Perry it is contended in effect that his homestead entry was legal; that under section 2297 of the Revised Statutes a settler is allowed six months in which to commence his residence on land entered by him under the homestead law, and therefore that this entryman had a legal right to make his homestead entry while he had a pre-emption claim pending upon which he afterward made final proof, and then, before the expiration of six months from date of homestead entry, established his residence on the land covered by said homestead entry.

This Department cannot recognize this as a correct exposition of the law. It has never recognized the right of a person to at the same time claim one tract as a pre-emptor and another as a homestead entryman, for the very good reason that both the pre-emption law and the homestead law require residence, and a person cannot maintain two residences at one and the same time.

While a homestead entryman is allowed six months within which to establish his actual residence upon the tract embraced in his entry, the law regards his residence as commencing from the date of his entry, and if it appears, or as in this case is shown by proof, that residence after that date was elsewhere, then clearly the homestead entry was illegal. *Rufus McConliss* (2 L. D., 622); *J. J. Caward* (3 L. D., 505); *Collar v. Collar* (4 L. D., 26); *Austin v. Norin* (4 L. D., 461).

The motion for review and rehearing must be denied, and the decision of May 12, 1886, is adhered to.

RAILROAD GRANT—FINAL PROOF.

BRADY v. SOUTHERN PAC. R. R. Co.

The notice of intention to make final proof given in accordance with the act of March 3, 1879, is an invitation to any and all parties to appear and show cause why the entry should not be allowed.

The failure of a railroad company, claiming, previous to selection, under a prior indemnity withdrawal, to thus appear and assert its claim is conclusive.

Acting Secretary Muldrow to Commissioner Sparks, February 8, 1887.

I have considered the case of Peter F. Brady v. the Southern Pacific Railroad Company, transmitted by your office letter, dated November 10, 1885, in accordance with departmental instructions, dated October 29, 1886.

The record shows that said Brady made homestead entry No. 45 of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 13, T. 26 S., R. 33 E., M. D. M., at the Bodie land office, California, on March 15, 1878, upon which final proof was made and final certificate No. 168 issued on April 13, 1885, at the Bodie land office, in said State.

The decision appealed from states that the land is within the thirty mile or indemnity limits of the grant to said company by act of Congress approved July 27, 1866 (14 Stat., 292); that the map of designated route of the line of said company's road was filed in your office on January 3, 1867, and the lands were ordered to be withdrawn by letter, dated March 22, 1867, which letter was received at the local land office on May 21, 1867. Your office held that, as the company had never selected said lands, its right to the land in controversy had never attached, and that by its failure to appear at the time of making final proof by Brady, the company had waived whatever right it might have asserted in the premises.

Notice was given by your office to the resident attorney of said company of said decision. Thereupon, the company on September 12, 1885, filed an appeal from said decision, which was dismissed by your office on September 25th ensuing. Upon application of the company, your office was directed to certify the papers to this Department under Rules of Practice Nos. 83 and 84.

It is contended by the company that Brady could acquire no right of entry of said land, because of said withdrawal, and that the notice given by Brady of his intention to make final proof was not a legal notice to the company, and that the company waived no right by not appearing at the local land office. This contention cannot be maintained.

By the act of Congress approved March 3, 1879 (20 Stat., 472), persons seeking to enter agricultural lands, under the pre-emption and homestead laws, are required to file with the register of the proper land office notice of their intention to make final proof, describing the land and giving the names of the witnesses by whom said proof will be made. Thereupon the register is required to make due publication and posting.

of such notices, and at the expiration of the period required for the publication and posting of the same, the claimants are entitled by law to make proof showing their right to enter the tracts claimed by them. This notice has been invariably held to be an invitation to any and all parties to appear at the time and place designated therein and contest the applicant's right to enter the land claimed by him. Brady gave this notice as required by law, and the company failed to appear and contest his right, and hence, having failed to speak when it should have spoken if it claimed any right to the lands covered by said entry, it can not now be heard to set up a claim after the settler has made proof and payment and received his certificate from the proper officers. No good reason is given why the company did not appear at the time and place designated and assert its rights to the land in controversy, if it had any.

In the case of the Atlantic and Pacific Railroad Company *v.* Andrew J. Forrester, decided by this Department on December 5, 1882 (1 L. D., 481), upon the authority of the case of Gilbert *v.* the Saint Joseph and Denver City Railroad Company (*ibid.*, 472), it was held that the company, because it failed to appear "to answer the regular citation issued upon Forrester's motion, was guilty of laches, by reason of which it may be held to have waived its right to assert title to the tract in question, or to object to the consummation of his claim to the same."

This ruling appears to have been invariably followed by this Department, as is shown by the reported cases of the St. Paul, Minneapolis and Manitoba R. R. Co. *v.* Cowles (3 L. D., 226), the Atlantic and Pacific R. R. Co. *v.* Buckman (*ibid.*, 276), and Matthew Sturm *v.* the Northern Pacific Railroad (5 L. D., 295), besides numerous other cases not reported.

While it is true that in the cases of Gilbert, Forrester and Sturm (*supra*), the lands were within the granted limits, the reason of the rule laid down in those cases applies with equal, if not more, force to cases of settlers within the limits of the withdrawal for indemnity purposes. *Prest v. The Northern Pacific R. R. Company* (2 L. D., 506).

A careful consideration of the whole record shows no good reason why the decision appealed from should be disturbed, and it is accordingly affirmed.

SCHOOL SECTION—SETTLEMENT BEFORE SURVEY.

JOHN JOHANSEN.

The right to assert a settlement claim for land within a school section is confined to the settler before survey.

Acting Secretary Muldrow to Commissioner Sparks, February 9, 1887.

I have considered the case of John Johansen, involving the NE. $\frac{1}{4}$ of Sec. 16, T. 5 S., R. 23 E. Salt Lake district, Utah.

One Charles P. Smith originally filed pre-emption declaratory statement on the tract, September 26, 1879, alleging settlement November 1,

1878—prior to filing of township map, in December, 1878, which disclosed the fact that the tract was a portion of a school section. In June, 1882, Smith sold the improvements to Johansen, who at once took possession, and at a later date applied to make homestead entry of the same. This application the local officers rejected; and on appeal, your office affirms their action. Johansen now appeals to the Department.

Johansen makes affidavit—sworn to before the register of the land office at Salt Lake City—that the improvements on the tract consist of two miles of irrigating ditches; a fence about the whole tract; thirty acres under cultivation; a log house with three doors, three windows, board floor, and otherwise comfortable as a residence; a log stable, a granary twelve by twenty-eight feet; a well seventeen feet deep; and other improvements, the whole being worth between \$1500 and \$2000, all of which belong to him, and he is the sole occupant of the tract.

Both the homestead and pre-emption laws require personal settlement on public land, in order to recognition of a claim thereunder. Hence in the present case the only person who could successfully contest the reservation in favor of the territory would be Smith, who settled upon the tract prior to survey—providing he had maintained residence since such settlement. But Johansen, settling subsequently to the survey could not defeat the claim of the Territory (Thomas E. Watson, 4 L. D., 169).

The decision of Mr. Secretary Teller, in the case of Christian P. Willingbeck (3 L. D., 383), upon which counsel for Johansen strongly relies in his appeal, declares the rule requiring personal settlement of the applicant to be technically correct. The decision in the case of Thomas E. Watson (*supra*) is believed to be a right interpretation of the law. I affirm your decision.

PRACTICE-APPEAL—REPAYMENT.

DEFFEBACH v. BONHAM ET AL.

Application for repayment and restoration of homestead right, filed pending appeal from a judgment cancelling a former homestead entry, is an abandonment of the appeal.

Acting Secretary Muldrow to Commissioner Sparks, February 9, 1887.

In the contest case of Lewis C. Deffebach against the homestead entry of William H. Bonham for the NW. $\frac{1}{4}$ of Sec. 30, T. 16 N., R. 14 W., Grand Island, Nebraska, in which the relinquishment of claimant was filed by Thomas M. Reed, and the latter was allowed to make homestead entry, your office, by letter of February 25, 1885, decided that said relinquishment was filed as a result of the contest, and accordingly held for cancellation said entry of Reed, and awarded the preference right to Deffebach. An appeal on behalf of Reed was filed.

Afterwards, on April 22, 1886, your office transmitted the application of said Reed for restoration of his homestead right and repayment of fees.

It is clear that Reed can not consistently maintain his appeal and this application at the same time. Only in the event of the failure of his appeal could the application referred to be considered. I must therefore hold, since the application was filed after the appeal, that the filing of the application for restoration of the homestead right and for return of fees amounts to an abandonment of the appeal.

This disposition of the case leaves nothing further to be considered by me. Said application is returned for the action of your office.

PRACTICE—APPEAL—REVIEW.

GRAY v. WARD ET AL.

The refusal of the General Land Office to review a decision is not appealable.

In case of a decision in the General Land Office where the rights of two or more of the parties are adversely affected thereby, the appeal of one will not preclude the consideration of a motion for review filed by another.

But the refusal of the Commissioner to entertain the motion for review affords no ground for the dismissal of the appeal.

Acting Secretary Muldrow to Commissioner Sparks, February 9, 1887.

I have considered the motion of counsel for Charles R. Gray, filed in this Department on December 24, 1886, to dismiss the appeal of John S. Ward from the decision of your office, dated August 27, 1886, cancelling his desert land entry No. 5 of Sec. 8, T. 2 S., R. 4 W., S. B. M., made at the Los Angeles land office, in the State of California, on May 4, 1877, and allowing Ward's homestead and timber culture applications for a portion of said section subject to the preference right of entry of John A. Dixon and Thomas C. Kendall.

It is alleged in said motion that said appeal by Ward was filed in your office without serving a copy of the same upon Gray or his counsel, as required by Rule of Practice No. 86 (4 L. D., 47); that prior to the filing of said appeal counsel for Gray had filed in your office a motion for a review and reconsideration of said decision, and served a copy thereof on the counsel for Ward; that said counsel recognized said Gray as a party to the record by serving a copy of their answer to said motion upon his said counsel, in which it was claimed that the appeal filed by Ward took precedence over the motion for review, and that your office held that under the departmental decision in the case of W. F. Hawes *et al.* (5 L. D., 284) that the filing of the appeal by Ward ousted your office of any jurisdiction over said case, and the papers were accordingly transmitted to this Department on December 18, 1886.

The decision sought to be reviewed states—and the record confirms the statement—that by the departmental decision, dated July 10, 1886 (L. & R., Vol. 57, p. 66), the action of your office, dated April 11, 1885, holding for cancellation Ward's said desert entry, was affirmed, and that the same was accordingly canceled upon your office records, and the local land officers were directed to note the same upon the records of their office.

It is further shown that Ward filed in the local land office on January 18, 1886, his relinquishment of the NW. $\frac{1}{4}$; N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said Sec. 8, which was transmitted to your office same day. On January 20, 1886, Ward applied to enter the NW. $\frac{1}{4}$ of said section under the homestead laws, and at the same time to make timber culture entry of said N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of same section, which applications were rejected by the local land officers, for the reason that contests were then pending against Ward's said desert entry.

It further appears that on December 19, 1881, Thomas C. Kendall, Charles H. Larrabe, and John A. Dixon filed affidavits of contest against said desert land entry, alleging that Ward had wholly abandoned said tract and wholly failed to comply with the requirements of the act of Congress to provide for the sale of desert lands, approved March 3, 1877, and at the same time offered to file their soldiers' homestead declaratory statements for the land. Notice was given and a day set for the trial of the cause, at which the contestants appeared with their witnesses, but the proceedings were suspended, in accordance with instructions from your office, dated February 7, 1882, to await the result of legislation relative to desert entries, then pending in Congress.

Your office, on August 27, 1886, held that the relinquishment of Ward served to open the land embraced therein to settlement and entry, and that Ward's homestead and timber culture applications should have been allowed, and the local land officers were directed to allow the same upon payment of fees and commissions, subject, however, to the preference right of Kendall, Dixon and Larrabe, for the reason that said relinquishment was filed while their contests were pending, and because Kendall and Dixon had filed soldier's and sailor's declaratory statements, the former for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and the latter for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section.

It appears that your office, on August 27, 1886—the same date of the decision in the case of Ward, *supra*—rendered a decision affirming the action of the local land officers rejecting Gray's application to make homestead entry of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 8, for the reason that the land applied for was embraced in the timber culture application of said Ward, which was then pending before your office on appeal. Thereupon, on September 28, 1886, counsel for Gray filed in your office a motion for review of both decisions of August 27, 1886, which your office refused on December 18, 1886, for

the reason that Ward filed two appeals, dated October 27, 1886, and November 3, 1886, from the action of your office in said case. The record further shows that said Gray, on October 6, 1886, offered another homestead application for the same land, which was rejected by the local land officers, for the reason that the land applied for had been entered by said Dixon on September 6, 1886.

The only question passed upon by said departmental decision was as to the cancellation of Ward's said desert land entry, and no opinion was expressed upon the rights of the respective applicants.

It is a well settled rule of practice in this Department that the refusal of your office to review its decisions is not appealable, the party has his remedy by appeal from the decision sought to be reviewed. *Pearson v. Bucklee* (6 C. L. O. 4); *Withee v. Martin* (3 L. D., 539); *White v. Doherty* (*Ibid.*, 551).

Rule of Practice 76 (4 L. D., 46) provides that "motions for rehearing before registers and receivers, or for review and reconsideration of the decision of the Commissioner or Secretary, will be allowed in accordance with legal principles applicable to motions for new trials at law after due notice to the opposing party," and it is the general rule unless changed by statute that a motion for a new trial is an application to the discretion of the court, and that discretion ought to be exercised in such a manner as will best answer the ends of justice. If that discretion is exercised improperly and not in accordance with settled principles of law and equity, the action of the court may be corrected by certiorari or mandamus. *Hilliard on New Trials* (p. 15).

The record shows that your office on the same day rendered two distinct and separate decisions, one against the interest of Ward and the other against the right of Gray, and it appears that neither Ward nor Gray can acquire any rights to the tracts claimed by them, unless the decision of your office is reversed, awarding the preference right of entry to Dixon of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said Sec. 8. Gray had the right of appeal from the decision denying his application to enter said tracts, but the refusal of your office to grant his motion for a review of said decisions is no reason why the motion to dismiss said appeal of Ward should be granted.

It is insisted that the case of *Hawes et al.* (*supra*) is not authority for the decision made by your office that the motion to review made by Gray could not be considered, because of the appeal filed by Ward. Where there are several parties to a suit pending in your office and a final decision has been rendered adverse to the rights of two or more of the parties to the suit, the filing of an appeal by one of the parties will not preclude the hearing of a motion for a review by another party to the record, asking a reconsideration of the decision so far as the same may affect his rights. But in the case at bar it does not appear that Gray was a party to the decision determining the rights of Ward and Dixon *et al.* He was a party to a decision rendered the same day by your of-

fice, involving some of the tracts mentioned in the decision in the case of *Ward v. Dixon et al.*, and from that decision he has the right of appeal.

But since your office has refused to consider Gray's motion for review, it is in effect a denial of the same, and it can not make any difference that the refusal was for a wrong reason. From the foregoing it is apparent that Gray claims an interest in a portion of the land involved in the decision appealed from by said Ward, and since all of the papers in the case are before this Department, Gray's application to be heard upon "the entire merits of the controversy" will be granted, and his counsel will be allowed to file a brief in his behalf within thirty days of notice hereof. The rights of all parties in interest will be duly considered when the case is reached in the regular order.

You will please advise the parties in interest of the action hereof upon said motion to dismiss.

PRE-EMPTION—SECOND FILING.

CLAYTON M. REED.

The filing and cash entry of one who removes from land of his own to settle on public land in the same State, exhausts his pre-emptive right, and he will not be allowed a second filing for the same land on the cancellation of his illegal entry.

Acting Secretary Muldrow to Commissioner Sparks, February 10, 1887.

By letter of May 29, 1885, your office held for cancellation the pre-emption cash entry of Clayton M. Reed for the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 26, and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 27, T. 45 N., R. 9 W., Lake City, Colorado, for the reason that he had abandoned his residence on land of his own to settle on the public land in the same State.

Claimant filed motion for review, and on consideration thereof, your office, by letter of November 19, 1885, adhered to its former decision.

Claimant appealed. It appears that in the summer of 1882 Reed made proof on a homestead claim in Colorado, and received final certificate therefor; that in December following he left said claim and took up his residence on the land above described, and that on July 9, 1883, he made proof, and payment. In February, 1883, he received patent for the land covered by his homestead claim. In May, 1885, he sold the latter tract to one Curt Von Hagen. It thus appears that he abandoned his residence on his own land to reside on the public land in the same State, and that he retained the ownership of his homestead claim during the full time of his residence on the pre-emption tract. Under these circumstances he cannot acquire any right of pre-emption. (Sec. 2260 R. S.) None of the cases cited by counsel for claimant present facts similar to those in this case, and I do not deem it necessary to discuss them further.

In his application for review, dated August 4, 1885, claimant alleges that since his said settlement he has continued to reside on said pre-emption claim, and has expended large sums of money for the improvement of the same, and asks in case of an adverse decision, that he be allowed to make a new pre-emption filing, dating his settlement from the date of the sale of his homestead, and that the money already paid be applied to the payment for said tract of land under the new entry. To grant this request is beyond the power of the Department. Reed must be charged with a knowledge of the law, and cannot be heard to plead ignorance of it. His attempt to acquire title to the tract in question was illegal throughout. In that attempt he has exhausted his pre-emption right. To allow him now to file again would in my opinion be a violation of law, and would allow him to take advantage of his own wrong.

Said decision is accordingly affirmed.

DESERT LAND ENTRY—DECLARATORY STATEMENT.

E. J. MEECHAM.

Under the desert land act but one declaration of intention to make entry is allowed.

Acting Secretary Muldrow to Commissioner Sparks, February 10, 1887.

I am in receipt of your office letter of May 20, 1885, transmitting the application of counsel for E. J. Meecham, asking for a review and reconsideration of Mr. Secretary Teller's decision of January 8, 1885, rejecting the application of E. J. Meecham to amend his desert land entry covering the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 4, T. 12, R. 13, Salt Lake district, Utah.

Said entry was made February 13, 1883. A few months later the homestead entry of another settler, on a tract adjoining Meecham's desert entry, was canceled, whereupon Meecham applied to amend his said desert entry so as to cover the tract thus released from homestead entry. The application alleges no error of law in my predecessor's decision, but pleads equity in Meecham's behalf, pointing out that if he were allowed to enter the tract as prayed for, his desert land entry would aggregate only one-half what the law authorizes. It appears that Meecham made or purchased the improvements on the tract he applies to enter, after its abandonment as a homestead, but prior to the cancellation of the homestead entry; and as no other claimant's rights are involved, and only the government is concerned, and as the refusal of his request will inflict considerable loss upon him with no benefit whatever to the government (which will receive from no other entryman any more than Meecham offers to pay for the tract), he urges that the matter be referred to the Board of Equitable Adjudication.

It may be conceded that in this particular case no harm would result to the government, and the applicant might be saved from hardship. Nevertheless, the rule of your office permitting but one declaration of intention to make entry under the desert land act, is one the advantages of which are so obvious, while the disadvantages inevitably resulting from its annulment would be so numerous and serious, that I do not think the Department would be justified in making an exception in favor of the applicant in this case. I therefore reaffirm said decision.

PRIVATE CLAIM—ACT OF JUNE 14, 1860.

SOUTHERN PAC. R. R. CO. *v.* BURLINGAME.

The date of a survey is determined by the date of its approval.

The publication and approval of a survey under the act of June 14, 1860, in the absence of an application to have it returned into court, has the same effect in law as the issue of patent.

The final determination of such survey is in the nature of a proceeding *in rem* and therefore conclusive as against claimants who fail to protect their interests.

A ruling of the Department as to the status of a tract of land, on the application of a pre-emptor, will not preclude the subsequent consideration of the same question on the application of the same person under another law.

A claim cannot be held as *sub judice* if before a tribunal or officer that has no authority or jurisdiction to adjudge the matter involved.

Acting Secretary Muldrow to Commissioner Sparks, February 14, 1887.

This case involves the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 17, T. 3 S., R. 13 W., S. B. M., Los Angeles, California, and comes here on appeal by the Southern Pacific Railroad Company from the decision of your predecessor, rendered September 19, 1884, denying its right to the tract specified.

This land is within the primary limits of the grant to the appellant to aid in the construction of its road under the acts of Congress of July 27, 1866 (14 Stat., 294–299), and of March 3, 1871 (16 Stat., 573). The map of designated route was accepted by the Secretary of the Interior and filed in the General Land Office April 3, 1871, whereby the grant attached to all lands subject to it under the said several acts; and the withdrawal was made and became effective at the district land office on the 10th of the following May.

By departmental decision rendered June 26, 1880, in the case of Wm. Burlingame *v.* Southern Pacific Railroad Company and the State of California, the land in question was held to have been excepted from the appellant's grant by reason of its having been embraced within the claimed limits of the "Tajauta Rancho," the true limits of which were not determined until February 21, 1872, and Burlingame's pre-emption filing for this with other lands was allowed to go to record. He did not, however, avail himself of his privilege under the pre-emption law, but abandoned it. Again, in the case of Garcia *v.* Southern Pacific

Railroad Company and State of California, this Department, on April 21, 1884, came to this same conclusion with reference to the status of this tract in controversy.

On the 1st of May, 1884, said Burlingame made timber culture application for this land; but it was rejected by the local office for the reason that said land was within the limits of the withdrawal for the appellant's road. Burlingame thereupon appealed, alleging as grounds therefor the fact that the Department had, in the two separate cases heretofore mentioned, held the land to be excepted from the appellant's grant. In the mean time, to wit, May 20, 1884, the company made selection of this land. The decision appealed from rejected this selection and allowed the said timber culture application of Burlingame subject to the right of appeal here.

The appellant's allegation of error on the part of your predecessor in this case is that "the land in question never was within the claimed limits of the 'Tajauta Rancho'—certainly not after the publication and approval of the Hancock survey of 1860 pursuant to the provisions of the act of June 14, 1860 (12 Stat., 33)."

It is insisted with considerable energy that the case is *res adjudicata*: that the allowance of Burlingame's filing for this land June 26, 1880, was an award the character of which can not now be inquired into. In other words, that the award *against* the company must stand. This contention, I think, is untenable under the ruling in the following cases: *Starkweather v. Atchison, Topeka & Santa Fe R. R. Co.* (6 C. L. O., 19) *White v. Hastings and Dakota Ry. Co.* (id., 54); *Griffin v. Central Pacific R. R. Co.* (5 L. D., 12); and *Charles W. Filkins* (id., 49). In the "White" case (*supra*) the land in controversy had been awarded to the railway company under the rulings then in force; but subsequently under a changed and corrected ruling said award was ascertained to have been erroneous, and an application was made by White to enter the land under the homestead law. In passing upon the case the Secretary said:

"Had title been transferred [by the award] there could be no doubt that the question of the *status* of the land, so far as this Department is concerned, would be settled. . . . I think it will not be seriously asserted that it would be the duty of the Department to transfer the title of the land to the company, if, under a correct construction of the law, said grantee had no valid claim to the same, simply because, at some former date, in a case other than the one presented to you an award had been made to said claimant."

So also in the case under consideration. Had a patent been issued to Burlingame, this Department would have been without jurisdiction to consider the case further. But as already stated he abandoned his pre-emption filing, and now makes a *new application* under a different law. This new application is an entirely independent transaction, and has no connection whatever with the former case of Burlingame against this company. The four essential elements of *res adjudicata* do not exist in

this case. The question, and *only* question, here is simply this: Did the tract specified pass to the railroad company under its grant? If it did, the Department should say so; and if it did not, it should likewise say so. For if title to the land in controversy passed to the railroad company under its grant, the issuance of patent for the same to an individual under the timber culture law would be a vain and futile act on the part of the United States, and such patent would be declared void by the courts. *Morton v. Nebraska* (21 Wall., 660).

Now, in arriving at a correct conclusion as to the status of the particular tract of land here in controversy, the facts and circumstances connected with the "Tajauta Rancho" and the several surveys thereof must be carefully considered. They are substantially as follows: The Tajauta grant, a Mexican grant of one league of land within larger exterior limits, having been finally confirmed under the act of 1851, the lines of a survey of the rancho, as confirmed, were run by Deputy Surveyor Hancock, in December, 1858. This survey was approved by the surveyor general September 17, 1860, after the passage of the said act of June 14, 1860, and it is therefore governed by that act. For it has been uniformly held that the date of the approval shall be regarded as the date of the survey. *Rancho San Barnabe* (1 C. L. L., 547); *Rancho Tajauta* (id., 548); *Rancho Arroyo Del Rodeo* (1 L. D., 229); *Rancho Cuyama No. 1* (2 C. L. L., 1205); *Southern Pacific R. R. Co. v. Garcia* (64 Cal., 515); and *Southern Pacific R. R. Co. v. Dull* (10 Saw., 506). This ruling is based upon the principle that lands are not surveyed until the survey is approved and becomes of record in the land office. *State of California v. Townsend et al.* (2 C. L. L., 1117, citing *Barnard's Heirs v. Ashley's Heirs*, 12 How., 43); *Finney v. Berger* (50 Cal., 248); and *Medley v. Robertson* (55 id., 396, and cited cases).

The act provides:

"That whenever the surveyor general of California shall in compliance with the thirteenth section of an act entitled 'An act to ascertain and settle (the) private land claims in the State of California,' approved March 3, 1851, have caused any private land claim to be surveyed, and a plat to be made thereof, he shall give notice that the same has been done, and the survey and plat approved by him, by a publication . . . once a week for four weeks in two newspapers, one published in Los Angeles, and one of which the place of publication is nearest the land, if the land is situated in the southern district of California; and until the expiration of such time, the survey and plat shall be retained in his office subject to inspection."

It further provides that the district court of that district may, upon the application of any party interested, make an order requiring such survey to be returned into said court for examination and adjudication, and if in its opinion the location and survey are erroneous, it may set it aside and annul the same, or correct and modify it. But if "after publication as aforesaid, no application shall be made to the said court for the said order, or when said order has been refused, or

when an order shall have been obtained as aforesaid, and when the district court by its decrees shall have finally approved said survey and location, or shall have reformed or modified the same, and determined the true location of the claim, it shall be the duty of the surveyor general to transmit without delay the plat or survey of the said survey to the general land office, and the patent for the land as surveyed shall forthwith be issued therefor, and no appeal shall be allowed from the order or decree as aforesaid of the said district court, unless applied for within six months from the date of the decree of the said district court, but not afterwards; and the said plat and survey, so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States."

The notice of this Hancock survey, and the filing of the approved plat was published in all respects as required by the provisions of the act just quoted, and the survey and plats were retained for inspection in the office of the surveyor general for the term prescribed by the act. No application was made to order it into court, in pursuance of the provisions of the act, and no such order was made. The survey thereby became final under the act in the latter part of September, 1860, after which it was transmitted by the surveyor general to the Commissioner of the General Land Office.

Some time thereafter, just prior to February, 1868, an application was made to the surveyor-general by the confirmee of the grant to have the Hancock survey, already become final, set aside, and a new one made, which application was referred to the Commissioner of the General Land Office, for his instructions. He directed the surveyor-general to make an examination of the case, and if the matter was found to be within the jurisdiction of the surveying department, to have a new survey made. Thereupon, by the directions of the surveyor-general, deputy surveyor-general George Hansen, in February, 1868, made a new survey and forwarded it to the General Land Office; but this latter survey was finally rejected by the Secretary of the Interior, February 21, 1872, as void, on the ground that the surveyor-general never had any jurisdiction to make it, because the Hancock survey of 1858 had become final in 1860, under that section of the said act above quoted, which provides "that the said plat and survey, so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law, as if a patent for the land so surveyed had been issued by the United States."

The Hancock survey did not include the tract in controversy, but it was embraced within the exterior boundaries of the "Tajauta Rancho," as claimed in the petition for confirmation, and the confirmee continued to claim the land as being within the Mexican grant at least until the final rejection of the Hansen survey by the Secretary of the Interior, as aforesaid.

Upon the foregoing state of facts it is contended on the part of the appellant that the tract of land in controversy passed to it under its grant by the acts of Congress before mentioned, while on the part of the appellee and your office it is contended with equal energy that the tract came within the exceptions contained in the language of the grant.

The grant by the said act of 1866 as made applicable by the said act of 1871 was in the words following, to wit:

"That there be, and hereby is, granted to the Southern Pacific Railroad Company of California . . . for the purpose of aiding in the construction of said railroad . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of . . . ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office."

As already stated, the rights of the road vested April 3, 1871; and unless the tract in controversy is within one of the exceptions found in the act, the company's title to it is paramount. The decisions of this Department upon the general question herein involved have not been uniform. Shortly after the rejection of the Hansen survey by the Secretary of the Interior in 1872, on the grounds heretofore specified, the Department acting upon the doctrine announced in that decision held that the Tajauta grant ceased to be *sub judice* when the Hancock survey became final in 1860; and that lands lying without that survey, though included within the petition for confirmation, and still claimed by the confirmees as being within said rancho, were, nevertheless, "public lands", and passed to the railroad company under its grant, unless they were within some other exception contained in the granting acts. Patent was thereupon issued to the company for a part of said section 17, adjacent to the tract in controversy, and which lands occupied the same status as this, and were in controversy in the case of Southern Pacific Railroad Company *v. Garcia (supra)* more particularly referred to hereafter.

Subsequently this rule was changed and in the cases first referred to in this decision, as well as in some others, the "Tajauta Rancho" was considered as being *sub judice* up until the final rejection of the Hansen survey in 1872. Following this later rule, another tract adjacent to this tract in controversy and similarly situated was patented in 1880 to H. J. Dull, who had settled there in 1872, in the face of the protest of the railroad company, and which land was involved in the case of Southern Pacific Railroad Company *v. said Dull (supra)*, hereafter referred to.

In the "Garcia" case (*supra*) the supreme court of California had under consideration the identical question, involving the "Tajauta Rancho," that is now before me. In that case Garcia had settled on the land in question in 1873 and set up claim to it under the pre-emption

law. The company brought ejectment in the State courts, and were defeated in the court below. But the supreme court of the State reversed that judgment, and held, citing 12 Opin. of Atty. Gen'l., 250, that—

“The publication and approval of the Hancock survey, in the absence of an application to have it returned to the district court, had the same effect and validity in law ‘as if a patent for the land so surveyed had had been issued by the United States.’ After that the grant was in no sense *sub judice*. It was the duty of the surveyor-general to transmit said survey to the General Land Office; and of that office, to forthwith issue a patent for the land in accordance with said survey. The grant became segregated from lands lying outside of said survey.”

This same question afterwards arose in the “Dull” case (*supra*). In that case Dull had settled upon the land therein in controversy in 1872, laid claim to it under the pre-emption law, and finally received a patent from the United States in 1880. He then sold and transferred the land to one Scheffelin, an alleged *bona fide* purchaser for value without notice. The company afterward filed its bill in equity to control the legal title vested in the defendants and sought a decree that defendants hold the title in trust for its benefit. The court in deciding the case says:

“If the Tajauta grant had been finally located before that date (the date of definite location of the road), then it was no longer *sub judice*, and the lands being outside the limits of the final survey were public lands, and subject to grant, and the Congressional grant attached, unless the land was within some other exception.” Citing *Ryan v. Central Pacific R. R. Co.* (99 U. S., 382).

And again, speaking in reference to the finality of the Hancock survey and commenting upon the statute of 1860 already quoted, the court say:

“The survey thereby became final under the act, after which it was transmitted to the Commissioner of the General Land Office. . . . The language is in the alternative, and puts a survey, become final by publication, upon the same footing with one made final by an ‘order, or decree’, of the court, and makes it in express terms, in its legal effect, the equivalent of a patent. . . . When this survey thus became final, under the act, it was *res adjudicata*, on the location, and there was no authority, or jurisdiction in the Land Department, or in any other officer of the government, to in any way interfere with it. There remained but the mere ministerial duty of issuing the patent which would be convenient evidence of title, already fully vested, under the Statutes, by the survey which had become final under the act, and been made equivalent to a patent. Upon this survey becoming final under the provisions of the act of 1860, the grant ceased to be *sub judice*; and all lands outside of the survey, thus made final became public lands of the United States, and subject to any other disposition under the law. Nothing can be *sub judice* before a tribunal, or officer, that has no authority or jurisdiction to adjudge the matter, or to in any way meddle or interfere with it. Any attempt to exercise such authority or any claim made against action already final, and beyond the reach of further jurisdiction, is simply a nullity.”

This same principle as regards the conclusiveness of the survey become final under the act of 1860, was announced in the cases of *Bissell v. Henshaw* (1 Sawyer 583), affirmed by the supreme court in *Henshaw v. Bissell* (18 Wall., 268); *Treadway v. Semple* (28 Cal., 655); and *Wright v. Semple* (32 id., 659). The cases all proceed upon the theory that the proceeding in relation to the final determination of the survey under the statute is in the nature of a proceeding *in rem* and therefore conclusive as against claimants under floating Mexican grants. In the case of *Bissell v. Henshaw* (*supra*) the court, in speaking of the proceedings in relation to the confirmation of the survey, say: "The proceeding is somewhat in the nature of a proceeding *in rem* under the statute, in which all parties are bound to intervene and protect their interests. If not, there could be no object in this provision of the act." And the supreme court on appeal affirmed this doctrine, and say further: "If the defendants, or those under whom they hold, failed to appear and contest the survey, they can not now be heard to question its correctness."

The precise question here for consideration has not, so far as I am aware, been passed upon by the United States supreme court in any case. But the decisions before referred to—the one a unanimous decision of the supreme court of California, and the other of the United States circuit court—are of very high authority, and appear to me to rest upon sound principles of law. They will therefore be followed in this decision.

For the reasons already set forth, the decision appealed from is reversed.

PRACTICE—FINAL ACTION—APPEAL.

WILLIAM M. O'DAY.

A decision of the General Land Office rejecting final proof and holding the entry for cancellation is a final action from which an appeal will lie.

The right to be further heard therein is lost by failure to appeal or apply for review within the proper period.

Acting Secretary Muldrow to Commissioner Sparks, February 15, 1887.

By letter "C", dated May 25, 1885, you rejected the final proof offered by William M. O'Day on his homestead entry No. 6452, November 7, 1882, cash entry No. 660, September 4, 1884, embracing the NW. $\frac{1}{4}$ of Sec. 20, T. 149 N., R. 66 W., Devils Lake, Dakota Territory, and held said entries for cancellation, subject to appeal.

August 12, 1885, the register reported that on June 5, 1885, claimant was duly notified of said decision, and that he had failed to take action in the matter. Thereupon, by letter "C", dated September 10, 1885, you canceled said entries, and closed the case.

September 12, 1885, there was filed in the local office an application for review of your said decision dated May 25, preceding, which appli-

cation was by letter dated September 17, 1885, duly transmitted to your office. November 14, 1885, an appeal from your said decision, dated September 10, 1885, was filed in the local office, which appeal was transmitted to your office by register's letter, dated November 16, 1885. You took no action, either in the matter of said application for review, or the appeal, and on December 23, 1885, transmitted the whole record to the department.

Your decision of May 25, 1885, was a final decision from which an appeal would lie; and the record which is not disputed shows that claimant was duly notified of said decision. He took no appeal from said decision, neither was his application for review within the time required by the rules. Consequently, under the rules your action of September 10, 1885, properly closed the case. Thereafter an appeal would not lie, neither could an application for review be considered. Rule 112.

Said appeal is therefore dismissed.

TIMBER CULTURE—RIGHT OF HEIRS TO MAKE ENTRY.

SHARRAR v. TEACHMAN ET AL.

The right of entry is in the heirs, where the land is found subject to such appropriation, and the legal applicant therefor dies before the status of the land is determined.

An entry in the name of, and for the benefit of all the heirs may be made on the application of one of the heirs, without power of attorney from the other heirs authorizing such action.

Commissioner Sparks to register and receiver, Lincoln, Nebraska, May 27, 1885.

I have considered the appeal of John L. Sharrar from your rejection of his application to contest timber culture entry No. 1571, made August 13, 1884, on the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 3, T. 12 N., R. 7 E., by James H. Teachman, one of the heirs of Joseph Teachman, transmitted with the receiver's letter of August 30, 1884.

Said tract was returned as saline land by the surveyor-general in 1862. It is also part of an odd numbered section within the limits of the withdrawal for the benefit of the grant to the Burlington and Missouri River Railroad Company, in Nebraska, by the act of July 2, 1864 (13 Stat., 365).

June 17, 1880, Joseph Teachman applied to enter said tract under the timber culture act. A hearing was had as to the character of the land, and on February 8, 1884, this office decided that the land is not saline and that Teachman's application should be admitted, as the railroad company has already received more land on that side (north) of its line than it is entitled to. The railroad company was allowed sixty

days for appeal from this decision. Under date of April 18, 1884, you reported that no appeal had been taken; also that Teachman and his wife had both died, and asked instructions. By office letter of May 14, 1884, you were informed that the case was governed by the decision in the case of *Railroad Co. v. Sturm* (2 L. D., 546), and instructed to allow Teachman's heirs to make entry of the land, if they applied within ninety days from the receipt of notice to that effect. Pursuant to such notice, James H. Teachman made entry as aforesaid, filing with his application an affidavit reciting that he is one of said heirs, named in the will of Joseph Teachman (a copy of which, unverified, is also filed), and that he is authorized by power of attorney from the other heirs to make entry in his own name for the benefit of, and in trust for them.

Sharrar filed his timber culture application for the land with his application to contest said entry.

You rejected his application, for the reason that the entry had been allowed under instructions from this office, and there was no ground for contest, whereupon he appealed. The grounds of appeal are that there is no law under which the right of a person to enter land descends on his death to his heirs, or under which such right can be devised; that one of the heirs of Joseph Teachman is insane, and has no guardian, and that said James H. Teachman has no authority to act for him; that the requirements of office letter of May 14, 1884, have not been complied with; that said entry is contrary to law; and that a hearing should be had to enable contestant to show that said James H. Teachman was not authorized by power of attorney to act for said heirs.

Sharrar claims to have been in possession of the land since April 5, 1884.

It is contended that this case differs radically from that of Sturm; that the land in controversy there was part of the public domain, subject to entry at the date of the application, and the decision simply held that entry should have been allowed, and an application which should have been admitted is equivalent to one duly placed of record; that Sturm's application was, upon reversal of the decision of the local officers, entitled to full force and effect as an entry from the date of its tender; that at the time Joseph Teachman made his application the land in question was reserved and could not be appropriated under the timber culture act, or ordinary settlement laws, until its agricultural character had been determined; that Teachman, having died before the decision of February 3, 1884, became final, never had any right to the land; that had he lived his application would only have dated from May 14, 1884, when said decision became final; and that he never performed any act on the land in pursuance of any rights previously acquired and had no rights which could descend to his heirs. Also, that Sharrar is the only person who has ever been in possession of said land.

Sturm applied to make timber culture entry of a tract of land in the limits of a railroad grant, and his application was for that reason rejected by the local officers. He appealed, claiming that the land was

excepted from the railroad grant by reason of being within the claimed limits of an unadjusted private grant at the date of definite location of the road.

Before decision here Sturm died. This office found that the land was excepted from the railroad grant as claimed, and was then public land, but held that as the widow had made no application for the land since her husband's death, she could claim no benefit from his application, as his right to make timber culture entry died with him. This was overruled by the Secretary of the Interior, who held that although Sturm did not actually make entry of the land, he applied to do so in good faith and tendered the requisite fees. And as there is no difference between a case where the filing was recorded and one where it was offered and rejected, neither is there any difference in such a case as that, so far as the applicant's rights are concerned, for they inured to the benefit of the heirs. That the tract was subject to entry and Sturm's right to enter was not prejudiced by the rejection of his application in the local office, and inasmuch as he was prevented by death from perfecting said application, entry would be allowed in proper form in the name of his heirs, if made within ninety days from the receipt of notice of said decision.

Joseph Teachman's application was rejected in your office for the reason that the tract had been returned, and noted on your records, as saline land, and, for the further reason, that if not saline, being part of an odd-numbered section, it was subject to the railroad grant.

The status of the land applied for by Sturm could be, and was, determined by an examination of the records of this office. To ascertain the condition of the land applied for by Teachman, a hearing as to the character of the soil was necessary before the question as to whether it inured to the railroad grant could be decided. Both cases involved examination and decision by this office. Sturm died before decision was rendered. Teachman died before the decision became final.

In my opinion, the difference between the two cases is not material.

Joseph Teachman applied to enter in good faith and, had he lived, could have perfected his claim, and his rights descended to his heirs as in the Sturm case. Sharrar gained nothing by settlement while the application of Teachman was pending.

That James H. Teachman is one of the heirs is not denied, and a power of attorney from the other heirs to make entry is not necessary. The entry should, however, have been in the name of and for the benefit of all the heirs.

Your action denying the application of Sharrar to contest is affirmed and sixty days allowed for appeal. Should this decision become final, James H. Teachman's application will be returned for correction, as above indicated.

NOTE.—This decision, on appeal, was affirmed by Acting Secretary Muldrow, February 15, 1887.

*PRACTICE; EVIDENCE—REHEARING.**CROW v. ANDRUS.*

Affidavits filed in a case after decision by the local office cannot be regarded as evidence, though entitled to consideration on motion for rehearing.

A rehearing will not be granted by the Department where an order for the same, made by the local office, was set aside on the motion of the applicant.

Acting Secretary Muldrow to Commissioner Sparks, February 18, 1887.

John A. Andrus made homestead entry No. 22,278 of the S. W. $\frac{1}{4}$ of Sec. 10, T. 101 N., R. 66 W., Mitchell, Dakota Territory, September 26, 1882, and commuted the same to cash entry No. 9452, March 31, 1883. His commutation proof submitted on that day showed that he established actual residence on his claim September 28, 1882; that his improvements consisted of a house ten by twelve feet, a barn and granary twelve by twenty-four feet, and five acres of breaking—total value, \$200; that he had resided continuously on the claim, "except when absent on business;" and that his family, consisting of his wife and two children, because of sickness had never resided on the claim.

By letter, dated December 11, 1883, the register transmitted the duly corroborated application of John Crow to contest said cash entry, charging that claimant had never established his residence upon said tract. Hearing was directed by your office letter "P," dated March 7, 1884, and had commencing June 25th following. After the contestant had submitted the testimony of himself and that of another witness, he called the claimant as a witness in his behalf. Counsel for claimant, however, objected, and instructed his client not to go on the stand as a witness until the contestant closed his testimony. Contestant then moved a continuance, which was overruled by the receiver, to which ruling contestant excepted and gave notice of an appeal to the Commissioner of the General Land Office. He then rested his case "subject to the action of the Honorable Commissioner." Claimant also rested his case "until the order of the Commissioner is made and heard from."

August 9, 1884, upon the application of contestant and the recommendation of Special Agent James it was ordered by the local office that the case be re-opened for trial, and that the day of hearing be set for September 23d following. August 12, same year, upon motion of claimant's counsel, counsel for contestant being present, the local office revoked and set aside said order for rehearing. December 6, 1884, the local officers considered the testimony submitted in the case, found therefrom that claimant had never resided upon his land as required by the law, and thereupon recommended the entry for cancellation. From this decision claimant appealed, and by decision, dated May 29, 1885, you affirmed the judgment of the local office, from which affirmance an appeal is brought here. With this appeal is also filed a motion for a rehearing in the premises, based upon alleged irregularities in the

former proceedings, etc. Since your said decision claimant has also filed a number of affidavits, intended to show his good faith in the matter of his claim, and the hardship that will result to him from a cancellation of his said entry. These later affidavits are not properly to be considered as evidence under Rule 72, but may properly be taken into consideration in connection with the motion for rehearing.

From the evidence submitted at the trial of this cause in June, 1884, I think it clearly apparent that claimant never established and maintained a residence upon his claim. It is clearly shown that at the time said entry was made claimant was temporarily in the Territory of Dakota, but immediately thereafter returned to Ashton, Illinois, where he continued to reside with his family during the time covered by his final proof; that he built or caused to be built an uninhabitable shanty on the dividing line, between this and another tract, which shanty was removed to his pre-emption claim about two weeks after final proof was made upon the tract in question. From this showing it is quite clear that claimant acted in bad faith throughout and that his entry should be canceled. Nor is there anything in the affidavits since filed in his behalf which would lead to a different conclusion. It is not alleged in any of such affidavits that claimant has ever resided upon the land in question, and therefore a motion for a new trial on this ground is overruled. As regards the alleged irregularities in the early proceedings in this case, it seems evident to me, that claimant cannot complain of them. After rehearing had been ordered by the local office—a rehearing which would undoubtedly have given claimant opportunity to present his case in its best light, such rehearing was upon motion of counsel for claimant set aside and revoked. It would seem that he is bound by such action, and should be estopped from now asking a rehearing upon any alleged irregularities in the former proceedings. The motion for rehearing is therefore denied, and your said decision is affirmed.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 19, 1887.

RULES TO BE OBSERVED IN PASSING ON FINAL PROOF PAPERS IN
PRE-EMPTION AND COMMUTED HOMESTEAD CASES.*

I. Where final proof or any part thereof is taken before the day advertised, require new advertisement and new proof, in whole or in part, as the case may require, to cover that which was taken out of time.

II. Where final proof or any part thereof is taken after the day advertised, require new advertisement and new proof, in whole or in part, as above provided, unless on day advertised due notice had been given of postponement to a day certain by the officer taking the proof, and the proof be taken in accordance with said postponement. Facts of post-

* For circulars see 4 L. D., 297; id. 473; 5 id. 178; id. 220.

ponement and notice must be certified by the officer taking the last proof.

III. The entire proof must be taken in accordance with notice given. If the testimony of either claimant or witnesses is taken at a different time or place than that advertised; require new advertisement and new proof as to such defective testimony.

IV. When witness not named in advertisement is substituted for advertised witness, require new notice and proof covering the testimony of substituted witness.

V. The certification of naturalization papers or other court records should be received only when made under the hand and seal of the clerk of the court in which such papers appear of record, but where a judicial record is shown to have existed and is now lost or destroyed, proof of the same may be made by secondary evidence, in accordance with the rules of evidence governing such proof.

VI. Where final proof is taken by officer not named in advertisement, it may be accepted if otherwise sufficient, provided that the proof is taken at the time and exact place designated in the printed notice, and provided the officer advertised to take said proof shall officially certify that no protest was ever filed before him against claimant's entry.

VII. The number, cause, and duration of all absences to be satisfactorily accounted for.

VIII. When proof is made before register and receiver and certificate does not bear the date of said proof, require of register and receiver explanation thereof, and if the delay was caused by failure to tender the money at date of making said proof require final affidavit, with corroborating proof, to cover date certificate was issued.

IX. When proof is made before any other officer, allow the necessary time only for a prompt transmittal of the papers to the district land office, and if any longer interval is shown between date of proof and date of certificate (if proof is otherwise sufficient) require affidavit of continued residence and non-alienation to cover date of final certificate.

W M. A. J. SPARKS,

Commissioner.

Approved Feb. 21, 1887:

H. L. MULDROW,

Acting Secretary.

DONATION—ORPHAN'S CLAIM.

LOUISA A. BUCHANAN.

If either, or both of the parents, have received a donation under any of the acts, the children are not entitled to claim under the fifth section of the act of July 17, 1854.

Acting Secretary Muldrow to Commissioner Sparks, February 24, 1887.

On August 22, 1885 (4 L. D., 103), this Department returned to your office the papers relative to the application of Louisa A. Buchanan, formerly Louisa A. Pegg, to be permitted to locate one hundred and

sixty acres of land in Vancouver land district, Washington Territory, under the fifth section of the act of Congress approved July 17, 1854 (10 Stat., 305), and directed your office to render a decision upon the merits of said application, subject to the right of appeal in case the decision should be adverse to the applicant.

The record shows the applicant is the daughter of Andrew and Julia F. Pegg, both of whom are deceased. The father while travelling towards the State of Oregon with his family and before he reached said State died in the year 1852. His widow and child, the applicant, then about one year old, proceeded into said State. In the spring of 1853, the widow, mother of the applicant, was married to Captain C. H. Fairchild, and they settled upon a tract of land containing three hundred and twenty acres, and perfected title thereto under the act of Congress approved September 27, 1850 (9 Stat., 496), one-half of which was awarded to the mother of the applicant. Under this state of facts, your office, on September 30, 1885, held that the application should be rejected, for the reason that the applicant was not an orphan within the meaning of the fifth section of said act. From said decision the applicant appeals, and alleges error—

1st, In holding that the term orphan in said section means a child who has lost both parents by death.

2d, In deciding that after the marriage of the mother to C. H. Fairchild, and the subsequent exercise of her donation right, the applicant was deprived of the privilege granted to orphans by law; and

3d, In rejecting the claim of the applicant.

It is observed that counsel for the appellant have filed no brief in the case, and have cited no authorities either of the courts or decisions of this Department. The fifth section of said act provides, "That in any case where orphans have been, or may be left, in either of said Territories, whose parents, or either of them, if living, would have been entitled to a donation under this act, or either of those of which it is amendatory, said orphans shall be entitled to a quarter section of land on due proof being made to the satisfaction of the surveyor general, subject to the decision of the Secretary of the Interior."

This act, which is amendatory of the act of Congress approved September 27, 1850 (9 Stat., 496), and also the act of Congress approved February 14, 1853 (10 Stat., 153), was carefully considered by my predecessor Secretary Schurz in the case of Shadrack Powell (2 C. L. L., 1369), decided February 28, 1880, in which it was held that said section conferred a benefit upon a certain class excluded from the operation of the prior acts, viz: orphans, who had been left in the Territory of Oregon or Washington, or who should be left, whose parents, or either of them, would have been entitled to a donation under the act of 1850 or 1853; that the amount of land to which such orphans would be entitled upon due proof was one hundred and sixty acres, and that taking into consideration the provisions of the three acts above cited, if either or both of the parents had received a donation under any of the acts,

the children were not so entitled to claim under and were not orphans within the meaning of the fifth section of said act of 1854.

It is not shown that said decision has been reversed or modified, and no good reason appears for overruling it. The decision of your office is therefore affirmed.

PRACTICE; FINAL PROOF—APPEAL.

W. B. ENNIS ET AL.

An order requiring additional proof, without final decision upon that already submitted, is not appealable.

Acting Secretary Muldrow to Commissioner Sparks, February 24, 1887.

W. B. Ennis and others have made application to have the record in the above stated case certified to the Department, alleging that by letters of August 24 and 25, you suspended the homestead entries of W. B. Ennis and others therein named, for the reason that their testimony as to the number of times and duration of their absence from their homesteads is vague and uncertain, and required claimants to furnish additional evidence through the local officers showing the number of times and duration of such absence. That from this action applicants appealed, which you refused to transmit, holding that "under the rules this is not such an appeal that can be submitted to the Secretary, and until the additional evidence called for is furnished, the case will remain suspended."

Applicants do not show that any final decision has been made in said case from which an appeal can be taken, or that they have declined to comply with said requirement, hence their application should be refused. Applicants may refuse to furnish additional proof, and elect to rely upon the proof submitted, in which event it would be your duty to make a final decision from which they would have the right of appeal.

You will notify claimants that they will be required to elect within thirty days whether they will furnish additional proof, or rely upon the proof submitted, and upon their action in the matter or at the expiration of thirty days, you will make a final decision in said cases.

DESERT LAND ENTRY—COMPACTNESS.

FRANCIS M. BISHOP.

Statutory rights are not abridged by departmental regulations.

An entry in conformity with the statute as to compactness must be allowed, though in contravention of the strict letter of the general circular.

The departmental regulations with respect to "compactness" of desert entries modified.

Secretary Lamar to Commissioner Sparks, February 24, 1887.

I am in receipt of your letter of April 10, 1886, transmitting the papers in the appeal of Francis M. Bishop from your decision of February 27, 1886, calling upon him to re-adjust the boundaries of his desert

land entry, made August 7, 1885, embracing six hundred acres in sections 8 and 17, T. 15 S., R. 13 E., Salt Lake district, Utah.

The tract in question is three-quarters of a mile wide by one and a quarter miles long, and your office holds that it is not "compact" in the sense in which the word is used in the desert land act (19 Stat., 377).

Your decision is based upon the regulations of the department, which so far as they bear upon the question of the compactness of tracts claimed under the desert land act, read as follows:

"The requirement of compactness will be held to be complied with on surveyed lands when a section, or part thereof, is described by legal subdivisions as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit, although parts of two or more sections may be taken to make up the quantity or equivalent of one section. But entries running along the margin or including both sides of streams, or being continuous merely in the sense of lying in a line so as to form a narrow strip, or in any other way showing a gross departure from all reasonable requirements of compactness, will not be admitted.

"In no case, where the full quantity of six hundred and forty acres is entered, will the side line on either side be permitted to exceed one mile and a quarter; and less in proportion in case the entry embraces less than a whole section or its equivalent." (Gen. Cir., March 1, 1884, p. 35).

As this entry embraces forty acres less than six hundred and forty acres, and yet is a mile and a quarter long, you held that it was not compact within the meaning of the rule above quoted, and you required the entryman to re-adjust his boundaries so as to bring his entry within the rule.

The desert land act provides "that no person shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres which shall be in compact form."

The tract in question, which as already indicated embraces six hundred acres, is in the form of a rectangular parallelogram, a mile and a quarter long, and three quarters of a mile wide. Its width is equal to three-fifths of its length, and is uniform throughout its length. The sole question presented is as to the compactness of the tract. Is it compact; or are its shape and contour such as to call for a re-adjustment of boundaries before patent can issue? The only provision of the law on the subject is that already quoted, that tracts entered under the desert land act "shall be in compact form." That the tract herein described is in compact form within any reasonable definition of the term "compact," can not be gainsaid. It is therefore compact within the meaning of the law and must be so regarded.

Consequently, to follow the strict language of the regulation and under it enforce the relinquishment of any portion of the tract for want of compactness would be to deprive the applicant of a statutory right, and this no rule or regulation of the Department can do.

Two propositions, therefore, present themselves. Either the regulation must be so interpreted and construed as to save the statutory right, or it must be so modified that it will not operate to defeat that right.

An examination of the decisions of the land department discloses the fact that the practice has not been uniform under the rule. In some cases the restriction as to length of tract has been followed literally; in others latitude has been given by a construction of the rule which saved entries, although they embraced tracts greater in length than the letter of the regulation would warrant. While convinced that the entry in the case before me fully meets the requirement of the statute with reference to compactness, I find it difficult to construe the regulation on the subject in such a way as to warrant the approval thereunder of this entry as described.

The closing sentence, commencing "In no case," of the regulation herein quoted relative to compactness is so explicit in its words of limitation as in my judgment to exclude this entry in its present form. To allow it and so comply with the statute would be to disregard the rule. The mandate of the law must be obeyed; hence the rule, in so far as it restricts a legal right in this case, must be disregarded.

But I do not think it advisable or wise to leave standing a regulation which in practice is found to come in conflict with the law on which it is supposed to be based. Regulations are devised and adopted to aid in the proper execution of the law, and where in any case it is found that they operate as an obstruction rather than as an aid they should be so changed or modified as to meet the purpose for which they are intended. The case under consideration convinces me that the regulation relative to desert land locations and entries should be modified by the elimination therefrom of the words:

"In no case, where the full quantity of six hundred and forty acres is entered, will the side line on either side be permitted to exceed one mile and a quarter; and less in proportion in case the entry embraces less than a whole section or its equivalent."

The residue of the regulation is in my judgment ample for the protection of the government and for the proper administration of the law by your office and the Department; and it properly leaves to the land department some discretion in determining what is and what is not a compliance with the law.

The decision appealed from is accordingly reversed, and you will adjudicate Bishop's desert land claim in accordance with the views herein expressed, treating his entry as embracing a tract compact in form.

It is proper here to add that this decision presents a somewhat different view as to the construction of the regulation relative to desert land entries in the matter of their compactness from that expressed in the case of Lizzie A. Devoe, decided by this Department July 7, 1886 (5 L. D., 4). In that case the regulation was treated as sufficiently

flexible to authorize the entry, the facts in which clearly met the requirement of the law with regard to compactness.

In this, upon a further consideration of the regulation, it is regarded as in part in conflict with the law, because its words of limitation are deemed to go beyond what the statute will authorize, and it is to that extent abrogated.

Such modification of the regulation in no way impugns the correctness of the conclusion arrived at in the Devoe case, but that case, in so far as the reasons therefor differ from this, is modified, and this decision will furnish the authority for action in all desert land cases not yet finally adjudicated in so far as the question of compactness is concerned.

RAILROAD GRANT—INDIAN RESERVATION.

JACKSON, LANSING & SAGINAW R. R. CO.

An order of the President, withdrawing lands for the use of Indians, existing at the date of a railroad grant and the definite location thereunder, excepts the land covered thereby from the operation of said grant.

Until said order was formally revoked, the effect thereof, as against the grant, remained unchanged, though the purpose of the withdrawal had ceased to exist.

Lands "in place" excepted from the grant are not subsequently subject to indemnity selection.

Acting Secretary Muldrow to Commissioner Sparks, February 26, 1887.

On May 15, 1871, the Jackson, Lansing and Saginaw Railroad Company presented to the local land office at Reed City, Michigan, a list of lands claimed under the grant by acts of Congress approved June 3, 1856 (11 Stat., 21), July 3, 1866 (14 Stat., 78), and March 3, 1871 (16 Stat., 582). Said list embraced twelve thousand, three hundred and thirty and forty-nine one-hundredths acres, situated in township thirty-four, thirty-five, and thirty-six north, range four west.

The record shows that said tracts are within the six mile or granted limits of said grant, and that the right of said company attached on October 23, 1858, the date when said company filed in your office a map showing the definite location of its road

It appears that on May 16, 1855, by order of the President and upon the recommendation of the Commissioner of Indian Affairs, your office directed the register and receiver of the Duncan land office, in said State, to withdraw from market the public lands (*inter alia*) in said townships. The order of withdrawal stated that it was made for Indian purposes, and upon the condition that "no peculiar or exclusive claim to any part of the land so withdrawn can be acquired by said Indians, for whose benefit it is understood to be made, until after they shall by future legislation be invested with the legal title."

The United States made a treaty with the Ottawa and Chippewa Indians of Michigan on July 31, 1855, by the provisions of which it was agreed that certain townships would be withdrawn from sale and reserved for the use of said Indians. This treaty was proclaimed by the President on September 10, 1856 (see Revision of Indian Treaties, p. 613). The withdrawal and reservation mentioned in said treaty did not embrace any of the lands in question. The Commissioner of Indian Affairs on March 3, 1860, in response to your office letter dated February 24, 1860, advised that the land not included in the reservation fixed by said treaty was not needed any longer for Indian purposes, and thereupon, on July 30, same year, the vacant lands in the even numbered sections in said townships were restored and offered at public sale at \$2.50 per acre. Pursuant to the order of the President, dated April 16, 1861, the public lands in said townships (with others) were, on April 22, same year, again withdrawn for the purpose of enlarging the Indian reservation. It was, however, determined that said lands would not be needed for that purpose and the even sections were restored to market on August 19, 1874. It further appears that the Grand Rapids and Indiana Railroad Company, one of the beneficiaries under said grant, presented to the local land officers a list of lands in said township 34, claimed by the company, said list was transmitted to this Department by your office letter, dated March 31, 1874, with the recommendation that the right of the company be recognized, and said list was approved by the Hon. Acting Secretary of the Interior on April 25, same year. The ground upon which your office based said recommendation is "that the treaty of 1855, proclaimed September 10, 1856, before the right of the road had attached, standing in place of and making unnecessary any further legislation, had the effect to release from further reservation the lands not included in its terms, although such lands were not formally restored until 1860."

Your office, on May 11, 1885, refused to concur in the view above quoted, and held said list for cancellation, upon the ground that said granting act of June 3, 1856, expressly reserves from the operation of the grant made thereby any and all lands theretofore reserved to the United States by act of Congress, or in any other manner by competent authority: that it can make no difference that the reservation was temporary in character and that the reason therefor had ceased to exist prior to the definite location of the road, and your office held that "the lands in question were withdrawn by competent authority pending the negotiation of a treaty with the Indians and not only the withdrawal but the reason for which it was ordered was in full force at the date of the grant, and being in a state of reservation at the date of the grant, they were not included therein" (citing *Leavenworth, Lawrence & Galveston R. R. Co. v. United States*, 92 U. S., 733).

From said decision the company appeals, and alleges error, in assuming jurisdiction to make said decision, because, so far as your office was

concerned, the precise question involved had become "both *stare decisis* and *res adjudicata*."

It will be observed that while your office, on January 15, 1874, submitted to this Department a report relative to the rights of the Grand Rapids and Indiana Railroad and of the Jackson, Lansing and Saginaw Railroad, in which the opinion was expressed that the right of the former company "vested on the 17th of November, 1857, to the odd sections within fifteen miles, under act of June 3, 1856, if the whole should be found necessary to satisfy the grant of six sections in width, and that the other company under the same act are entitled to the odd sections within the fifteen miles limits, outside the limits of the Grand Rapids and Indiana, the latter company having the prior location," also that, looking at the evident understanding of the government at that time that it needed no final order of the President to revoke the conditional withdrawal for Indian purposes, the odd sections of right belonged to the grant.

Instead of concurring in all the views expressed in said report, this Department declined to express any opinion as to the rights of the railroads to lands in range four. It is true that subsequently your office submitted to this Department for approval a list of lands falling within the six mile limits of the first named railroad, which was approved on April 25, 1874, as above stated, but it does not appear that any formal action has been taken upon the list at bar, certainly none by this Department. But if it be conceded that your office had no jurisdiction to hold said list for cancellation, surely it can not be contended that this Department has no authority to determine the right of said company to the lands embraced in said list, and if it shall not appear that said lands were granted to the State for the benefit of said company, it will be the duty of the Secretary to refuse to approve said list, and in so doing he will be "exercising that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands." *Lee v. Johnson* (116 U. S., 48).

It will hardly be necessary to discuss the question whether lands in a state of reservation at the date of said grant are by the terms thereof excepted from its operation, if they are free from embarrassment at the date of the definite location of the road, for in the case at bar it is evident that the lands in question were withdrawn by order of the President prior to the date of said grant, and was still in force at the date of the definite location of the road. The even sections within the granted limits were not restored until 1860.

It is no answer to say that the object for which the withdrawal had been made had been accomplished and therefore the proclamation of said treaty of its own force worked a revocation of said withdrawal. It does not do so in terms, and the rights of railroad companies under their grants can not be enlarged by intendment. It is, however, contended by the company that, if it is not entitled to select these lands "in place," then it

should be allowed to select them as indemnity. But this contention can not be maintained, for this Department in the case of the St. Paul and Duluth Railroad Company (4 L. D., 407), upon the authority of the case of L., L. & G. Ry. Company v. United States (92 U. S., 733), and the case of Winona and St. Peter R. R. Company v. Barney (113 U. S. 618), held that "if the lands are excepted out of the grant once, they were so excepted for all purposes."

For the reasons herein stated, the conclusion of your office, holding said list for cancellation, must be affirmed.

PRACTICE—SECOND CONTEST—APPEAL.

HOODE v. SANDO ET AL.

The right to proceed with a second contest exists only on the final disposition of the prior pending contest.

Acting Secretary Muldrow to Commissioner Sparks, February 26, 1887.

This record presents the appeal of Lars P. Hoode from the decision of your office, dated March 28, 1885, dismissing his contest against timber culture entry No. 1908 of the NW. $\frac{1}{4}$ of Sec. 28, T. 116, R. 55, made on April 7, 1879, at the Yankton land office, in the Territory of Dakota, and directing the local land officers to allow Ole L. Christiansen to proceed with his contest against said entry.

It appears that said Christiansen filed his affidavit of contest against said entry on February 19, 1883, alleging failure to comply with the requirements of the timber culture law, which application was rejected by the local land officers, because the section in which said tract was situated was not stated in said contest affidavit. The affidavit was withdrawn, and again filed on March 10, 1883, and again rejected because of Hoode's prior contest, dated February 23, 1883. On June 19, 1882, said Hoode filed his affidavit of contest against said entry, notice issued same day, hearing was had on August 8th, same year, and upon the testimony submitted the local land officers recommended that said entry be canceled. On August 14, 1883, your office dismissed Hoode's said contest, because he had failed to file an application to enter said tract in accordance with the rule in the Bundy case (1 L. D., 179). No appeal was taken from said decision. On April 10, 1883, Christiansen appealed from the rejection of both contest affidavits, which appeal was transmitted to your office on January 24, 1884. It is alleged in said appeal that the omission to insert the section in the contest affidavit was a clerical error, that the section was stated in the application to enter which accompanied said contest affidavit, that the error was not made known until March 10, 1883, when it was corrected and the paper re-filed, and again rejected, as above stated.

It is also shown that, on October 24, 1883, said Hoode filed another contest affidavit against said entry, accompanied by an application to enter said tract under the timber culture law, notice issued same day, fixing December 5, 1883, for the hearing of said case. From the testimony submitted the local land officers found that the claimant in his lifetime and his legal representatives, since his death, have not complied with the requirements of said act. On October 24, 1884, the local land officers transmitted to your office the papers in Hoode's contest. On November 25, 1884, the local land officers transmitted to your office the affidavit of contest against said entry and application to enter said tract made on September 6, 1884, by John S. Sigler. Accompanying said application is the affidavit of said Sigler, alleging that the contest of said Hoode was speculative, and not made for his own interest, but for the benefit of one George Osler, his son-in law. Sigler asked that a hearing be ordered and that Hoode should be directed to show cause why his contest should not be dismissed.

On March 28, 1885, your office considered the rights of the respective parties and held that Hoode's contest must be dismissed because of the prior contest of Christiansen, that Sigler's application must be rejected because he is a stranger to the record, and that Christiansen should be allowed to proceed with his contest against the heirs and legal representatives of the deceased entryman. In your office letter of transmittal, it is stated that "the record of contest in the case of Christiansen *v.* Sando, and the appeal of John S. Sigler from a decision of the local officers adverse to him involving this entry, are also enclosed. The last named cases have not been finally passed upon by this office." It appears, however, that your office did reject Sigler's application, as above stated.

It thus appears that while appeals have been pending from the action of the local land officers, nevertheless they have allowed parties to proceed at much expense to prove the failure of the entryman and his heirs to comply with the requirements of the law as to cultivation and planting the land. This is bad practice and works an unnecessary hardship upon litigants. The first application of Christiansen should not have been allowed by the local officers without instructions from your office, on account of the pending contest of Hoode; but having been offered and having been perfected on March 10, 1883, and an appeal taken from its rejection, when your office rejected Hoode's prior contest on August 14, 1883, from which no appeal was taken, Christiansen's rights attached, and there was no error in allowing him to proceed with his contest in case the decision of your office became final, either for want of an appeal, or was affirmed by the decision of this Department. *Churchill v. Seeley et al.* (4 L. D., 589).

In his appeal, Hoode alleges that on February 26, 1883, he initiated a new contest, filing therewith his timber culture application for said tract. But this statement does not appear to be confirmed by the rec-

ord. It is true that upon the original contest affidavit filed by Christiansen appears this indorsement, "Rejected, because of a prior contest, Hoo-de v. Sando, filed Feb. 26, 1883." But the only prior contest filed by Hoo-de, as shown by the record, was the one filed on June 19, 1882, and his subsequent affidavit of contest was made and filed on October 24, 1883. So that Hoo-de's rights must be held subject to those of Christiansen. Sigler does not allege that Christiansen's contest is speculative and fraudulent, hence there was no error in refusing his application to contest. The conclusion of your office in the decision appealed from is accordingly affirmed.

REPAYMENT—DOUBLE MINIMUM EXCESS.

FREDERICK W. FRESE.

Repayment is allowed for double minimum excess paid on land subsequently found not to be within the limits of a railroad grant.

Acting Secretary Muldrow to Commissioner Sparks, February 26, 1887.

By letter of the 11th instant, your office transmitted the "application of Frederick W. Frese for return of double minimum excess paid on San Francisco, California, pre-emption cash entry No. 7519, for the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 2, T. 18 S., R. 3 E."

Said letter requests early action, "as there is a large number of cases of this class pending."

By act of Congress approved July 27, 1866 (14 Stat., 292), a grant of lands was made to the Atlantic and Pacific Railroad Company, "Beginning at or near the town of Springfield, in the State of Missouri, thence to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific." Several maps of definite location were filed, which carried the definite location of the road to San Buenaventura on the Pacific Ocean.

On March 12, 1872, said company filed in your office a map of definite location from San Francisco to San Miguel Mission, and thereupon your office, by letter of April 22, 1872, withdrew the odd sections along said line and raised to the double minimum price the even sections. The land in question lies within the twenty mile limits therein defined, and in an even section.

It appears that Frese filed declaratory statement December 11, 1877, alleging settlement in October, 1872, and made final proof January 27, 1881, paying for the land at the rate of \$2.50 per acre.

On March 23, 1886, this Department held that the acceptance of the maps of definite location between San Buenaventura and San Francisco

(one of them being that filed March 12, 1872,) was without authority and void, and that the company had no grant between these points. (4 L. D., 458.)

The act of June 16, 1880 (21 Stat., 287), provides that “. . . . in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or his heirs or assigns.”

In the present case the applicant has paid the double minimum price for the land, and the land has afterwards been found not to be within the limits of a railroad grant.

I think this case comes clearly within the statute, and that repayment of the excess of one dollar and twenty-five cents per acre should be made.

PRACTICE—REVIEW—APPEAL.

W. F. HAWES ET AL. (ON REVIEW.)

The filing of an appeal, in any appealable case, is a waiver of any and all motions which may have been previously filed relative to the decision from which appeal is taken.

Acting Secretary Muldrow to Commissioner Sparks, February 28, 1887.

I have before me a motion, filed December 22d *ultimo*, in behalf of the Union Pacific Railway Company, assignee of the entrymen, for review of departmental decision of November 13, 1886 (5 L. D., 224), in the matter of the Gunnison, Colorado, coal entry No. 1, made June 6, 1883, in the names of Alfred R. King, Henry A. Tidd, Willis Mallory, and James Fiskien.

* * * *

September 22, 1884, counsel for the railway company, acting for said company as the purchaser of the land in question from the parties in whose names the filings and entry were made, filed in your office an application to have said coal entry No. 1 corrected, and asking that the parties to the several declaratory statements for the land be permitted to make separate entries in accordance with said declaratory statements, and also that an investigation be ordered touching the regularity and validity of said two declaratory statements and the rights of the respective declarants therein.

October 4, 1884, W. F. Hawes, acting for the railway company and also for King *et al.*, the entrymen, filed in the local office an appeal from your office decision, holding the entry, No. 1, for cancellation, which appeal was on October 9, 1884, forwarded to your office, and was passed upon by the departmental decision sought to be reviewed. The motion for review insists that the application to have the entry amended

so as to conform to the filings should have been considered to the exclusion of the appeal.

In said motion counsel for the company urge that the entry as made was the result of mistake, for which the register and receiver, as well as the person or persons who made the entry, were responsible, and that the error should be corrected by the Department in the manner suggested by their petition thus securing to the company the benefits of its purchase.

The Department recognizes its right and its duty to correct errors committed by the local land officers, when properly brought to its attention. There is therefore no difference between counsel and the Department on this question. The only difference is as to the manner or nature of the correction.

The decision under consideration approved the action of your office, holding the illegal entry for cancellation, while the motion for review seeks a correction by amendment in pursuance of an application filed in September, 1834, and this notwithstanding an appeal from your office decision was filed subsequently to said application for amendment. All the facts now presented were before the Department when its decision in the case was rendered, and no good reason appears for changing the conclusion then arrived at. That decision adhered to the rule of the Department, that when an appeal has been filed and accepted in any case, your office has no longer any jurisdiction to further consider such case, and that the only action then proper is to forward the case to this Department for final disposition on the appeal. Under this rule your office could not properly act upon the application to amend filed in this case. The appeal subsequently filed and accepted took away jurisdiction to act on the petition. The Department considered and acted upon the appeal rather than on the petition, which action in my judgment was proper.

The appeal brought the case here. Not only that, but it is a well established rule of law that the filing of an appeal in any appealable case is a waiver of any and all motions which may have been previously filed relative to the decision appealed from. The plea that counsel who filed the petition for amendment did not have notice of the appeal is without force, since both the petition and the appeal were filed in behalf of the same party or parties, but by different counsel, or attorneys. The company can not be allowed to plead want of notice of its own acts.

After a careful consideration of the case in all its aspects, I must decline to grant the motion, and the decision of November 12th is adhered to.

It may here be added that were I to re-open the case and consider the application to amend the entry, I am unable to see how in the face of the record facts and for reasons not necessary to here discuss, any result favorable to applicants could be reached.

PRE-EMPTION—HOMESTEAD ENTRY.

DUNLAP v. RAGGIO ET AL.

In the absence of a legal intervening settlement claim, there is no penalty for failure to make proof and payment, for unoffered land, within the statutory period.

The right of a pre-emptor to purchase is not defeated by the adverse claim of a homesteader, who alleges residence within less than six months after entry, and fails to show the same.

Acting Secretary Muldrow to Commissioner Sparks, February 28, 1887.

I have considered the case of George Dunlap v. Ernest and Richard Raggio, on appeal by the former from your office decision of July 28, 1885.

On December 13, 1880, Dunlap filed declaratory statement for lots 6, 9, 10 and 11, Sec. 15, T. 4 N., R. 14 E., M. D. M., Sacramento, California, alleging settlement on the 7th of the same month. On April 22, 1884, Richard Raggio made homestead entry for lots 10, 11, 14 and 15, same section, and on the same day Ernest Raggio, his brother, filed declaratory statement for lots 6, 7, 8 and 9, in the same section, alleging settlement on the 20th of that month.

On May 1, 1884, Dunlap published notice of intention to submit proof on June 24, 1884, and cited Ernest and Richard Raggio to appear. All parties appeared and submitted testimony. The local officers found that since the date of Dunlap's settlement, December 7, 1880, his residence has been continuous, excepting such times as his business called him away. That he has at all times since the date of establishing his residence thereon, up to the time of this hearing, claimed and considered this land as his home. That his improvements consist of a house, barn and wagon shed, thirty acres cleared, ready for plowing, and fifteen acres plowed, a good brush fence on a considerable portion thereof; total value of these improvements from \$300 to \$400. The local officers further discussed certain absences of Dunlap, but failed to find any evidence of bad faith therein. They say: "We are therefore of opinion and decide that the good faith and intent of the pre-emption claimant, George Dunlap, is thoroughly established; that while the said Dunlap failed to make his final proof within the prescribed time, the circumstances are in his favor, and he should be allowed to enter the land embraced in his declaratory statement. . . . As to the Raggios, the evidence shows that they reside at the town of Sheep Ranch and are engaged in the business of running a store, livery stable, and wood contracting. That it is their evident intention to erect a saw mill on the land embraced within their claims, and the timber thereon is of a suitable nature. That the settlement made by them upon this land is not such a settlement and residence as is contemplated by the homestead and pre-emption law." The local officers recommended that the

entry and filing of Richard and Ernest Raggio be canceled, so far as they conflicted with the claim of Dunlap.

Your office held that the evidence failed to show that Dunlap had ever established a *bona fide* residence upon the land, reversed the decision of the local officers, and awarded the land to Ernest and Richard Raggio, subject to their making final proof at proper time.

On the question of the good faith of Dunlap a large amount of testimony was submitted, in some respects conflicting. The testimony was taken before the local officers, and was carefully considered by them, as is shown by their opinion. On a careful examination of the testimony, on this point, I concur with them that Dunlap has maintained a continuous residence under the law, and this conclusion is largely based on the fact that the local officers conducted the examination of the witnesses and therefore had the best opportunity of deciding in cases of conflicting testimony.

The Raggios claim to have settled on April 20, 1884, and to have commenced their actual residence on their respective tracts about May 1st. The testimony related largely to this matter, and after a careful examination of the same, I agree with the local officers that the Raggios, at the date of hearing, resided at the town of Sheep Ranch, and were engaged in business there, and that they did not have a residence on the tracts in question. I am therefore of opinion that no valid adverse claim has intervened, and consequently that there is no reason shown why Dunlap's entry should not be allowed. Dunlap was required by law to make proof and payment within thirty three months from settlement, but in case of failure so to do his claim did not terminate. "The law prescribes no penalty for failure to make proof and payment within the statutory period, beyond rendering the land subject to the claim of the next settler, in order of time, who has complied with the law." (J. B. Raymond, 2 L. D., 659). Inasmuch as it appeared on Dunlap's offer of proof and payment that the Raggios had failed to comply with the law, their claims can form no lawful bar to the entry of Dunlap. (*Fidler v. Kurth*, 5 L. D., 188). It is true that the question arose within six months after the homestead entry of Richard Raggio, and also true that he was not required to take up his actual residence upon the tract during that period, but inasmuch as he claimed to have established actual residence during that time, and pleaded his residence as a bar to the entry of Dunlap, the whole question of the validity of his claim to the tract was necessarily in issue.

For the reasons stated, the decision appealed from is reversed, the entry of Dunlap will be allowed, if no other objection appear, and the filing and entry of Ernest and Richard Raggio, respectively, will be canceled.

OSAGE LAND—PRE-EMPTION—PURCHASE BEFORE PATENT.

UNITED STATES *v.* JOHNSON ET AL.

Until all of the preliminary acts required by law have been performed by the pre-emptor he has acquired no right as against the government.

Purchasers after entry and before patent take only an equity and are charged with notice of all defects in their title.

Acting Secretary Muldrow to Commissioner Sparks, February 28, 1887.

I have considered the several cases of the United States *v.* Daniel Johnson, Henry C. Keefer, Martin Traverse, Martin Hayden, John C. Davidson, entrymen, and Edward Corrigan, transferee, as presented by the appeals of the latter from the decision of your office, dated July 14, 1885, refusing to revoke its former action canceling the Osage cash entries of Johnson, Keefer, Traverse, and Hayden, and holding for cancellation the Osage cash entry of Davidson.

The record shows that Johnson made Osage entry (application No. 3361) November 16, 1882, of the NW. $\frac{1}{4}$ of Sec. 28; that Keefer made entry (application No. 3432) December 7, 1882, of the NW. $\frac{1}{4}$ of Sec. 33; that Traverse made entry (application No. 3383) November 21, 1882, of the SE. $\frac{1}{4}$ of Sec. 23; that Hayden made entry (application No. 3434) December 7, 1882, of the NE. $\frac{1}{4}$ of Sec. 33, and that John C. Davidson made entry (application No. 3650) April 10, 1883, of the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 34—all in township 34, S., R. 9 W., Wichita land district, Kansas.

In July and August, 1883, your office canceled the entries of Johnson, Keefer, Traverse and Hayden, upon the reports of a special agent of your office and allowed the entrymen sixty days within which to show cause why their entries should be re-instated.

Hayden was duly notified of your office decision canceling his said entry, but took no action thereon, and your office, on January 28, 1885, closed his case and James E. Talley was allowed to make entry of said land. On May 17, 1884, your office ordered a hearing upon the report of a special agent that Davidson's entry was fraudulent and made in the interest of another.

On March 7, 1885, S. J. Crawford, Esq., entered his appearance in your office in behalf of the parties claiming said lands, filed certain affidavits, waived their right to a hearing, and asked that the several cases be examined on their merits. Your office, on July 14, 1885, considered the several cases and held that the affidavits submitted by the claimants are not sufficient to overcome the proofs of fraud submitted by said special agent. On August 22, 1885, the attorney for the claimants filed an appeal from said decision of your office, upon the ground that the affidavits submitted on March 7, 1885, show conclusively that the entrymen complied substantially with the law governing the sale of Osage lands.

On September 16, 1885, Messrs. Hatton and Rugles, attorneys for said Corrigan, filed in the local land office four separate appeals from said decision of your office, dated July 14, 1885, canceling said entries. Counsel for Corrigan have filed copy of an argument made in the cases of Talley and Talley *v.* Traverse and Keefer and Corrigan, transferee, on appeal from your office decision, dated December 3, 1884, and decided by this Department on June 3, 1886, (L. & R., vol. 55, p. 408,) involving the validity of said entries.

It is insisted by the counsel for the transferee that said decisions of your office canceling said entries are void for want of jurisdiction, and that after the register and receiver have accepted the proofs and payment, in whole or in part, from the pre-emptor, the courts of the country are the only tribunals that can inquire into allegations of fraud in the procurement of an entry, and upon proof cancel the same. This question has been repeatedly adjudicated by this Department, and must be considered as well settled against the contention of the appellant.

It is clear that under the decisions of the courts, until all of the preliminary acts required by law have been performed by the pre-emptor he has acquired no right as against the government. *Frisbie v. Whitney* (9 Wall., 189); *The Yosemite Valley case* (15 Wall., 77); *Grand Gulf R. R. & Banking Co. et al. v. Bryan* (8 Smed & M., 268); *Hutton v. Frisbie* (37 Cal., 475); *Phelps et al. v. Kellogg* (15 Ill., 135); *Bird v. Ward* (1 Mo., 398); *Perry v. O'Hanlon* (11 Mo., 585); *Lamont v. Stimson* (3 Wis., 545).

If there was any doubt of the power of the Commissioner of the General Land Office to cancel the entries when fraudulently made, the exercise of that power for a long time is very persuasive that the jurisdiction has been properly exercised. *Edwards v. Darby* (12 Wheaton, 206); *Atkins v. Disintegrating Co.*, 18 Wall., 272, 301; *Smythe v. Fiske* (23 Wall., 374, 382); *United States v. Pugh* (99 U. S., 265); *United States v. Moore* (95 U. S., 760, 763).

It is further insisted by the appellant Corrigan that he is an innocent purchaser without notice, and therefore the cancellation of said entries could not affect his rights. But this contention can not be maintained. All purchasers of lands after entry and prior to the issuance of patents are charged with notice that said entries must be confirmed by your office, and if the entrymen has imposed upon the register and receiver with false and fraudulent proof and thereby obtained a certificate of entry, the purchaser can acquire no better title than the vendor possessed.

In the case of *Root v. Shields* (1 Woolworth, 340), in the United States circuit court for Nebraska, the court held (Mr. Justice Miller), that parties claiming to be *bona fide* purchasers will not be protected as such when (1) they purchased before the patent of the government issued, although they had no knowledge in fact of any defect in their title, because they purchased only an equity. (2) When the defect in the title arises out of a rule of law, of which they are bound to take

notice, and (3) When the title acquired is absolutely void. See also *Kerr et al. v. Watts* (6 Wheaton, 160); *Carroll v. Safford* (3 How., 461); *Randall v. Edert et al.* (7 Min., 359); *Gray et al. v. Stockton* (3 Minn., 472); *Arnold v. Grimes* (2 Iowa, Greeue's Rep., 83); 3 Opin., 91 & 666.

In the case of *Whitaker ex rel. v. Southern Pacific R. R. Co.*, decided July 27, 1880, (2 C. L. L., 919,) this Department held that the words "bona fide purchasers for a valuable consideration," found in section 2262 of the Revised Statutes, must be understood as having been used according to their well established legal import, as there was nothing in the statute to show that any other sense was intended; that it was well settled that the doctrine of *bona fide* purchasers for a valuable consideration does not apply to the case of the purchaser of an equity; that the doctrine is used for the protection of purchasers of legal or apparently legal titles; that it can only be used as a defence. It is a mere shield and not a weapon of attack (3 Op., 93); that in all cases of purchases of pre-empted lands before the issuance of patents therefor, the rule *caveat emptor* is particularly applicable; and if the entries are fraudulent or void, the purchasers acquire nothing; and that the benefits of the doctrine of bona fide purchaser under said section 2262 can only be sought and applied in the courts. The following authorities are cited in support of the conclusions: *Polk's Lessee v. Wendell* (5 Wheaton, 308); *Vattier v. Hinde* (7 Peters, 27); *Sampeyreac and Stevens v. United States* (ibid., 241); *Boone v. Chiles* (10 Peters, 179); *Carroll v. Safford* (3 How., 461); *Shepley v. Cowan* (1 Otto, 340); *Moore v. Robbins* (6 Otto, 530); *Smith v. Shane et al.* (1 McLean, 27); *Dupont v. Waterman* (10 Cal., 354); *Chew v. Barnet* (11 Serg. & R., Pa., 3893); *Pinson v. Ivey* (1 Verger, Tenn., 302); *Craig v. Leeifer et al.* (10 Tenn., 193); *Oakly v. Ballard et al.* (1 Hemstead, 476).

The decision in the case of *Whitaker (supra)* has been uniformly followed by this Department. See cases of *Margaret S. Kissack* (2 C. L. L., 421) and *C. P. Cogswell* (3 L. D., 23), where the subject was carefully considered by my predecessor, Secretary Teller,—and the case of *R. M. Chrisinger* (4 L. D., 347), decided January 25, 1886.

But aside from the foregoing, the power to cancel an illegal entry by this Department is expressly recognized by the act of Congress approved May 14, 1880 (21 Stat., 140), wherein it is provided that the successful contestant shall have the preference right of entry of the tract covered by the entry canceled by his procurement.

The record shows that the appellants through their counsel expressly waived any right to a hearing and asked your office to determine the rights of the parties upon the ex-parte affidavits filed in the case. The testimony is for the most part in direct conflict, but your office found that the affidavits submitted by the appellants were not sufficient to overcome the proof submitted by the special agent of your office, tend-

ing to show that said entrymen had never been actual settlers on the tracts claimed by them. If that be true, then the entries were made in fraud of the law, and they should be canceled. *United States v. Woodbury et al.* (15 L. D., 303); *Brake v. Ballou* (19 Kansas, 397).

In the cases at bar the entrymen failed to make application for a re-instatement of their said entries within the prescribed time after due notice thereof, and the transferee bases his defence upon the want of power of this Department to cancel said entries.

It will be observed, however, that Mr. Crawford, in his appeal, dated August 22, 1885, insists that the affidavits submitted by him in support of said entries show conclusively that the entrymen complied substantially with the law regulating the sale of said lands. The proof in each case was made in accordance with the rules and regulations of this Department relative to entries under the general pre-emption laws. No question is raised by the appellant that the rules and regulations governing such entries do not apply to the entries under consideration. The decision appealed from proceeded upon the theory, which was sustained by the decisions of the Department, that the entryman under the provisions of said acts providing for the sale of the Osage trust and Diminished Reserve lands in Kansas, must show full compliance with the requirements of the general pre-emption laws. But in the case of the *United States v. Woodbury et al.* (5 L. D., 303), it was held by this Department that "the only condition prerequisite to an entry of these lands is that the purchaser shall be an actual settler with the qualifications of a pre-emptor," and the case of *Morgan v. Craig* (10 C. L. O., 234), cited in *La Bolt v. Robinson* (3 L. D., 490), was overruled.

Since the decision of your office was rendered under the construction of the law by the Department, which has since been modified as above indicated, and the affidavits submitted by the special agent are in conflict with those submitted by the claimants, so that it is difficult to ascertain the exact facts concerning said entries, it is deemed advisable that a hearing be had in accordance with the rules of practice, giving all parties in interest an opportunity to be heard and cross-examine the witnesses who may testify against their interests. To that end you will please direct the local land office to order such hearing, to ascertain whether said entrymen were actual settlers at the date of their respective entries and were possessed of the qualifications of pre-emptors. Upon the receipt of the testimony submitted with the opinion of the local land officers, your office will again consider the cases. A special agent, if practicable, should be present to protect the interests of the government.

The decision appealed from is modified accordingly.

HOMESTEAD CONTEST—PRACTICE.

BRANNON *v.* URIELL.

Failure to submit evidence, on due opportunity offered in the regular course of proceeding, cuts off the right to be further heard on the merits.

Acting Secretary Muldrow to Commissioner Sparks, March 1, 1887.

On July 29, 1880, Louisa Uriell made homestead entry for the NW. $\frac{1}{4}$ of Sec. 21, T. 104, R. 62, Mitchell, Dakota. In February, 1882, Edward Brannon brought contest against the same on the charge of abandonment. On April 10, the day set for hearing, a motion for continuance on the part of claimant was filed and overruled by the local officers; contestant submitted the testimony of certain witnesses tending to show that claimant had never established residence on the land. Afterwards, on September 20, 1883, the local officers sent out notice to the claimant that they had adjudged her entry forfeited. Thereupon claimant filed a motion to set aside the judgment and dismiss the contest, setting out various irregularities in proceeding. The local officers, on May 3, 1884, ruled as follows: "In order that no question may arise as to the regularity of the proceedings, upon motion of J. K. Doolittle, attorney for contestant, as well as upon motion of said claimant, it is hereby ordered that said contest be dismissed, and that said contestant be permitted to initiate a new contest against the same entry." On the same day contestant filed a new affidavit of contest, also alleging abandonment, and service of notice thereof was acknowledged by attorney for claimant. Hearing was ordered for July 3, 1884. On that day contestant with witnesses appeared and submitted testimony to the effect that no one had resided on the tract in question from the date of entry to May 3, 1884, the date of the initiation of the second contest; that a house was built on the tract in the fall of 1883, but was uninhabited; that there was no cultivation whatever, and that the land remained in a state of nature. The case was then continued to August 9, and on that day claimant filed a motion to dismiss, which was overruled. She was then offered an opportunity to submit testimony, but refused, and took an exception to the order overruling her said motion. The local officers thereupon decided in favor of contestant, and on appeal your office by letter of July 11, 1885, affirmed that decision. Claimant's present appeal sets up many grounds of error, the only ones requiring any notice being as follows: that the local office erred in overruling her motion to dismiss the first contest. That question can not now be raised, for the first contest has been dismissed, and on claimant's own motion. She further urges that it was error to award contestant a right to initiate a second contest on said motion. While it is true that the local officers have no authority to award such a privilege, it is not pretended that any adverse right intervened between the dismissal of the first and the initiation of

the second contest, nor that claimant had in the meantime complied with the law. The present contestant was therefore in the same position as any other applicant for the right of contest, and no harm was done claimant by the order of the local office. The local officers granted her motion to dismiss and of that ruling she can not complain. She says further that she was not present at the hearing on July 3. Whatever may be the fact, she had notice of the hearing and shows no reason for her absence, and is therefore bound by the evidence submitted. In any event, her refusal on August 9, to submit evidence when offered the opportunity in the regular course of proceeding, cut off her right to be heard further on the merits of the case. I find no reason for disturbing said decision, and it is accordingly affirmed.

INDIAN LANDS—ALLOTMENTS—SANTEE SIOUX.

LEWIS E. SCOTT ET AL.

Allotments under the act of March 3, 1863, were excepted from the Executive order opening the reservation to settlement and entry.

Acting Secretary Muldrow to Commissioner Sparks, March 1, 1887.

I am in receipt of the appeals of Lewis E. Scott, Ida B. Sunderland, Gideon Warner, George F. Bolster, Henry Vodeger, Emil Schindler, and Yokert Kozina, from your decision of August 13, 1885, affirming the action of the local officers in rejecting their applications to make pre-emption filings or homestead or timber-culture entries upon certain lands described by them in the Niobrara land district, Nebraska.

The ground of the rejection of said applications was that the tracts applied for were formerly within the limits of the Santee Sioux Indian reservation, and in each case had been selected by and allotted to individual Indians under the provisions of Executive Order dated February 9, 1885.

These appeals are based substantially on the ground that the allotments were not made under any existing law or treaty. The records of your office, however, show that the land in question is within the Santee Sioux Indian reservation, and that the allotments herein were made under the act of March 3, 1863 (12 Stat., 819), and were duly approved by the President; and no reason is shown why such disposition of the land was not in accordance with said act. I affirm your decision.

HOMESTEAD ENTRY—COMMUTATION PROOF.

WHITCOMB v. BOOS.

On the commutation of a homestead entry the plea of poverty, as an excuse for absence from the land, is not consistent with good faith.

Acting Secretary Muldrow to Commissioner Sparks, March 1, 1887.

I have considered the case of Leslie C. Whitcomb v. Ferdinand Boos, involving the SE. $\frac{1}{4}$ of Sec. 7, T. 111, R. 63, Huron district, Dakota.

Boos made homestead entry of the tract described, August 12, 1882. Contest was initiated January 22, 1884. February 19, 1885, final proof was offered; contestant appeared and protested. Hearing on the protest and contest was had April 18, 1884—the allegation being failure to comply with the law in the matter of residence and cultivation. The local officers held that claimant's residence and improvements had been sufficient. Contestant appealed; but it appearing that notice of decision was given him September 18, while the appeal was not filed in the local office until October 29, 1884—forty-one days afterward—the local office and your office rejected the appeal. Your office, however, refuses to consider the decision of the local officers final, holding it to be “contrary to existing laws and regulations” (see Rule 48 of Practice); and you proceed to consider the case upon its merits, in view of the testimony taken at the hearing.

According to claimant's own testimony, he put up a shanty on the land and first staid there over night January 15, 1883, and the next day returned to Huron with the team he had hired to take him to the tract. He kept a memorandum of the number of times he visited the tract after that, from which it appears that he went to the land four times in February; three times in March; five times in April; in May he broke five or six acres, and was there three days; in June visited the tract twice; in July three times; in August five times; and so on. He says he did not sleep on his claim every time he visited it. One of his visits is thus described by witness Fink: “About the middle of July was the first time I saw Boos; he came to my house and left a part of a velocipede; he said he was going to his claim; he was gone about two hours and came back, and said he was going to Huron.”

As bearing upon claimant's good faith, witness Lincoln testifies: “My impression is that he did not put up his house till the last of February; because he came up to work on it, and staid with me over night, and said his six months was up, and he must put up something to *make a show*.”

In short, the testimony is convincing that claimant did not make the tract his home; but that he made his home with his father, in the village of Huron, until he (the claimant) married, and that thereafter he lived with his wife, on the claim of her brother, for whom she worked. There is nothing to indicate that his wife ever went near the tract, from her marriage (in October, 1883,) till the hearing (in April, 1884).

It is noticeable that one of claimant's two final-proof witnesses lives several miles distant from his claim; that the witnesses against him are persons living nearest to his claim; and that two or more of the persons living near his claim were requested by him to serve as witnesses on his offering final proof, but refused, not considering that he had complied with the law.

Counsel for claimant contend that the decision of your office is unjust and oppressive, in that claimant is "bound down hand and foot by poverty, and the victim of misfortune." But this fact would, under the circumstances, tend rather than otherwise to strengthen the suspicion of bad faith on his part; for if he really intended to make the land his home, no reason appears why one so exceedingly poor—not only penniless, but in debt—should insist on paying two hundred dollars for what he might obtain for nothing, and when he had yet over five years within which to comply with the provisions of the law in order to do so.

In view of the facts herein set forth, clearly indicating an attempt to obtain title to the tract in question without fulfilling in good faith the requirements of the law, I affirm your office decision reversing the action of the local officers, and direct that Boos's entry be canceled.

PRACTICE—NOTICE OF APPEAL AND ARGUMENT.

COOPER v. HARRIS.

It is a valid objection to the notice of appeal and argument that the copies thereof, furnished opposite counsel, are not legible.

Permanent absence from the land immediately following final proof, offered in the presence of an adverse claim, and prior to the issuance of final certificate, indicative of bad faith.

Acting Secretary Muldrow to Commissioner Sparks, March 3, 1887.

I have considered the case of J. C. Cooper v. Edward C. Harris, involving the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 6, T. 111 N., R. 65 W., Huron, Dakota, on appeal by Harris from your decision of March 31, 1886, holding his filing for cancellation and awarding the land to Cooper.

The material facts in the case are substantially as follows: Harris filed his pre-emption declaratory statement March 9, 1882, for the NW. $\frac{1}{4}$ of said section, alleging settlement February 23, 1882. March 15, 1882, said filing was canceled upon relinquishment as to the W. $\frac{1}{2}$ of the tract, and left intact as to the E. $\frac{1}{2}$.

July 24, 1882, Cooper filed pre-emption declaratory statement for said E. $\frac{1}{2}$, with allegation of settlement July 19, 1882.

Harris, on the 27th of November, 1882, offered his pre-emption final proof on the tract in question, and Cooper filed a protest against the allowance of the same, setting forth that Harris had not made settlement and residence in good faith. On said protest a hearing was ordered.

January 16, 1884, your office rejected said final proof as unsatisfactory in regard to residence, but as his time for making proof had not expired Harris was given an opportunity to present new proof. From that action he appealed, and on the 31st of October, 1884, the Department affirmed your said office decision of January 16, 1884.

In the meantime, Harris went with his family upon the tract, and on November 3, 1884, again offered final proof, and protest was again filed by Cooper, charging (1) that Harris had failed to make any settlement or commence any improvements upon said tract prior to filing his declaratory statement therefor; (2) that said declaratory statement was not made in good faith for his own use and benefit, but for speculative purposes, he being in collusion with certain parties named in the protest as at that time connected with the D. C. Railway Company, in the employ of which Harris was a train dispatcher; (3) that said Harris had failed to reside upon, inhabit and improve said land as required by the pre-emption law; and (4) that he was maintaining a claim to said tract under proof previously offered and then pending before the Secretary of the Interior.

It will be observed that Harris did not await the promulgation of the decision on his appeal to the Department before making his second offer of final proof.

Said decision allowing him to make new final proof was rendered October 31, 1884. His final proof was offered November 3, 1884, after due notice by publication. In connection therewith he made a special affidavit, from which it appears that he first went on to the tract with his family in March, 1884. On the 24th of the same month (November, 1884) Cooper offered final proof under his filing for the same land. Harris filed protest, alleging prior settlement, and that Cooper had not settled upon, inhabited or improved said tract as required by law.

Hearing was ordered, and on the day set (February 3, 1885) a motion was made in behalf of Harris that so much of Cooper's protest as is not limited strictly to a denial of his (Harris's) residence as stated in the new proof, submitted by said Harris November 3, 1884, be dismissed.

Upon this motion the register and receiver ruled that any further examination of witnesses be confined to the allegations as to residence.

The hearing then proceeded, and several witnesses in behalf of Cooper as protestant were examined. Harris offered no testimony, and declined to place any witnesses upon the stand. He elected to rest the case and stand on his final proof. Cooper was thus deprived of an opportunity to cross-examine Harris or his witnesses on final proof.

The local office ruled in favor of Harris, from which action Cooper appealed to your office, which reversed the action below and held the filing of Harris for cancellation.

From that decision appeal is now before me. Objection is made thereto by counsel for Cooper on the ground that the copy thereof served upon them is not legible. Said copy is here in the case, having

been forwarded with request that proceedings be stayed, and that appellant be required to serve upon them a legible copy of said appeal and argument.

Had said motion been made promptly upon receipt of said copy by counsel for Cooper, I think I should have favorably considered their petition, for upon inspection of the copy complained of I find it impossible to read it as a whole, and it is with difficulty that even the more important portions thereof can be deciphered. However, as by close scrutiny and patient examination enough of it can be read to disclose the fact that it is an appeal from your decision now under consideration, and substantially what the grounds of appeal are, I have concluded, since counsel waited several weeks before presenting their objections, and in order to prevent further delay, to consider and dispose of the case on the record as presented.

The evidence clearly shows that Harris did not establish an actual residence upon the tract prior to March, 1884, when as he himself states he moved on to the tract with his family. At that date, however, Cooper was residing upon the land and was claiming it. He continued his residence on the land and was there at the date of the hearing, February 3, 1885, after both had offered their final proof.

While Harris took his family upon the tract in March, 1884, and they remained there, as far as the record shows, until he offered his proof in November, 1884, they and he then left the land, and he has not since inhabited the tract. He thus terminated what he claimed was residence, although his proofs were objected to and final certificate thereon did not issue. The case is still a pending one on his final proof. Notwithstanding this, it appears he has not only left the land, but has gone to a distant State and is there residing. He was not even in the Territory at the date of the hearing. These facts are not consistent with the theory of good faith under his filing.

Upon a full consideration of all the facts and circumstances, I find nothing in the case which calls for a disturbance of the conclusion arrived at by you, and your decision is affirmed.

RELINQUISHMENT; PRACTICE—APPEAL.

BRADWAY v. DOWD.

On the presentation of the entryman's relinquishment accompanied by his application to enter the land under a different law, the existing entry should be at once canceled and the application allowed subject to any intervening adverse right. The appellant does not waive the right to prosecute his pending appeal by the institution of a second contest on new ground of action.

Acting Secretary Muldrow to Commissioner Sparks, March 3, 1887.

I have considered the appeal of John H. Bradway from the decision of your office, dated April 17, 1885, holding for cancellation his timber

culture entry, made October 1, 1884, at Fargo, Dakota Territory, for the SE. $\frac{1}{4}$ of Sec. 18, T. 140 N., R. 53 W.

It appears that on February 5, 1878, Patrick Dowd made timber culture entry of said tract, and contest was filed against the same on June 12, 1883, by Robert Hayes, alleging failure to plow and plant according to law. Hearing was set for August 2, 1883. At that time the cause was continued until November 14, 1883, on application of the plaintiff. On November 1, 1883, a stipulation was filed, signed by the attorneys of both parties, withdrawing and dismissing said contest. At the same time was presented the relinquishment of said entry by Dowd, and an application by him to enter the tract under the homestead laws. The register and receiver seem not to have acted upon any of these papers at the time of their presentation. But those officers state that "on the adjourned day of this case (November 12) neither party appeared and the case was dismissed"; and on the same day "John H. Bradway filed contest against this claim, and deposited fees and application to enter subject to the final disposition of this case."

On December 21, 1883, the register and receiver transmitted the papers to your office, reporting that in their opinion the transaction between Hayes and Dowd was a corrupt one, and that it was a clear case of "buying off" a contest, and that it was the second time Dowd had bought off a similar contest. They therefore recommended that Hayes be held to have forfeited all further rights under the timber culture laws; that the relinquishment of Dowd be accepted and his timber culture entry be canceled, and the land declared open to entry by the first legal applicant; and that said relinquishment having been presented prior to the contest of Bradway, the latter can not gain any priority by virtue thereof.

There seems to have been no appeal to your office from these findings and recommendations of the register and receiver, but on September 15, 1884, said case was acted upon by your office, and the recommendations of the local officers not approved. It was held that the contest of Hayes ought to have been dismissed, the relinquishment of Dowd received on presentation, his timber culture entry canceled forthwith, his homestead entry allowed, and the action dismissing the Hayes contest was approved; and instructions were issued in accordance to the local officers. From this decision of your office no appeal was taken.

It does not appear from anything in the record on what day the letter containing these instructions was received at the local office. But it is inferred it was received and the instructions, as to cancellation of said timber culture entry of Dowd, carried out, on or shortly before September 30, 1884, because, on October 1, 1884, at 9 A. M., Bradway was allowed to make timber culture entry of said tract, "subject to the rights of Patrick Dowd (see Commissioner, 'C', September 15, 1884)." On the same day, at 3 P. M., Dowd made homestead entry as allowed by the Commissioner's letter. On April 17, 1885, the said timber culture

entry of Bradway was held for cancellation by your office, and it is the appeal of Bradway from that action which is now before me.

When Dowd's relinquishment of his timber culture entry was presented at the Fargo office on November 1, 1884, it was the duty of the local officers to have received it and forthwith have canceled the entry; and the application of Dowd to make homestead entry presented with the relinquishment should have been received and recorded then and there. *Mitchell v. Robinson* (3 L. D., 546); *Tilton v. Price* (4 L. D., 123); *Cleveland v. Banas* (ib., 534).

Ordinarily such entry would be subject to the preferred right of the contestant; but in this case the withdrawal of his contest by Hayes, presented at the same time, was a waiver of such preferred right; and at the time of the presentation of Dowd's homestead entry on November 1, 1883, the land was open to entry, and there was no claim set up to the same by any one.

Dowd thus clearly having the first right to enter said tract, your office acted properly when on April 17, 1885, it held for cancellation the timber culture entry of Bradway, made October 1, 1884. I therefore affirm your judgment in the premises.

It appears that since the above appeal was taken, and on October 15, 1885, the said Bradway initiated a contest against the said homestead entry of Dowd alleging abandonment and failure to establish residence. A hearing was had before the local officers, who were of opinion that contestant fully substantiated the charges, and recommended the cancellation of said entry. From this action Dowd appealed, and without action thereon you have transmitted the papers in said case to this Department.

The appeal of Bradway, which I have been considering, insisted upon his right to enter the tract in question, as superior to that of Dowd. The contest since instituted involves no question as to the prior right of entry, but, conceding the legal and actual existence of said entry, seeks its cancellation because of failure, on the part of the entryman, to comply with the law as to residence. The contest is thus based upon a separate and distinctive cause of action, arising long subsequent to the first claim of Bradway. This being so, the case does not come within the rule as laid down in the case of *Holdridge v. Clark* (4 L. D., 382), and other similar cases, which hold that the right of appeal from an adverse decision is waived by the initiation of a second contest. Therefore I have considered and disposed of the appeal of Bradway from the cancellation of his entry and not dismissed it because of his subsequent contest.

However the register and receiver erred in ordering a hearing and taking testimony in said contest, pending the appeal of Bradway, but should have held the contest to await the disposition of the pending cause.

I return to you the papers in said contest for your action thereon. Should the record disclose that the defendant therein appeared and participated in the proceedings without raising any objection to their irregularity, because of the pendency of said appeal of Bradway, the irregularity of said proceedings, in that respect, ought to be considered as waived by him, and the case passed upon by you as though said irregularity had not existed.

PRE-EMPTION—HEIRS—ADMINISTRATOR.

FOSTER v. SMITH ET AL.

On the death of a pre-emptor his heirs may complete the entry at any time within the period allowed the pre-emptor.

The administrator is likewise authorized to make such entry from the date of his official qualification.

The intervention of an adverse claim cuts off the right of an administrator who after notice of such right, fails to take action within the proper period.

Acting Secretary Muldrow to Commissioner Sparks, March 3, 1887.

I have considered the case of George M. Foster v. John T. Smith, administrator of the estate of Joseph Preiss, deceased, on appeal by Foster from your office decision of May 31, 1884, holding for cancellation his homestead entry and allowing an entry for the heirs of Preiss. The tract involved embraces the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ Sec. 30, T. 26, R. 9 W., Niobrara land district, Nebraska.

From the record, it appears that Joseph Preiss, an unmarried man, filed his declaratory statement on March 23, alleging settlement March 17, 1880; that he built a one-story house ten by twelve feet; dug a well; broke fifteen acres, perhaps partially cultivated the same, and resided on the tract up to the time of his death on June 25, 1882. That prior to his death, Preiss was engaged in a contest concerning this land, with one Elder; that your office rendered a decision in that case on September 19, 1882, canceling the entry of Elder, and authorizing an entry by Preiss (on payment of the purchase money) upon proof tendered at the trial, notice of which decision was duly sent out; that on August 25, 1882, Smith was appointed administrator, but did not learn of the rights of Preiss in the premises until December 15th following.

The record further shows that Foster, a married man, having a family, on August 3, 1883, applied to enter the tract under the homestead law; that his application was rejected by the local officers, for the reason that "the land applied for is embraced in the declaratory statement filing of Joseph Preiss, his final proof of which was accepted by the Honorable Commissioner September 19, 1882." From this decision Foster appealed, alleging that the rights of Preiss, if any, had expired. On that appeal your predecessor on October 15, 1883, held:

"The failure of the pre-emptor to complete his entry by making payment within a reasonable time after your notice amounted to an aban-

donment or waiver of his right to enter upon the proof presented in February, 1882, and the land was subject to entry at the date of Foster's application, which you will allow. The right of the administrator to make proof at this time cannot be determined as the case now stands. Should he desire to test the question, he should apply to make proof and payment after due publication of notice of intention to do so."

Accordingly on November 20, 1883, Foster, with his family, settled upon the tract; built a comfortable residence twelve by thirty feet; a frame barn; cow stable; shed; corral; enclosed a hog lot, and cultivated forty acres in oats, potatoes and garden produce, valued in all at about \$600.00, and has continued to live thereon. On March 3, 1884, he made homestead entry.

About one month after Foster's application to enter, to wit, in September, 1883, the administrator forwarded to the local office his administration papers, together with \$200.00, as payment for the land, which were returned to him, because the final proof made by Preiss, now deceased, has been rejected. The administrator, afterwards, on March 19, 1884, made supplemental proof, to which Foster filed protest. Foster also offered commutation proof on November 10, 1884, which was rejected and he appealed.

On this state of facts your office finds that "Smith appears to have used due diligence in attempting to complete the claim of said pre-emptor."

Section two of the act of March 3, 1843, provides "That in any case where a party entitled to claim the benefits of any of the pre-emption laws shall have died before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same." The circular of the General Land Office of May 8, 1843, referring to said section, says:

"The second section provides for the rights of parties who shall have died before consummating their claims by the filing in due time of all the papers essential to establish the same. Under it you are authorized, if proof of such right shall be filed and payment thereof be made by the executor or administrator or one of the heirs, *during the period prescribed by the law* upon which the claim is founded, to permit the entry in the name of the heirs of the deceased claimant." (1 Lester, 370.)

These instructions have been followed to the present time. The existing regulations provide that—

"The legal representatives of the deceased pre-emptor are entitled to make the entry at any time within the period during which the pre-emptor would have been entitled to do so had he lived." (Gen. Cir., p. 9.)

The pre-emption law requires that a settler on land not yet proclaimed for sale shall make the proper proof *and payment* within thirty-three months from date of settlement. In case of failure so to do, the tract

of land will be awarded to the next qualified claimant in order of time who has complied with the law.

At the date of claimant's death twenty-seven months and eight days of that period had expired. It is clear that under the existing regulations as above quoted the heirs might have made the entry at any time, and the administrator was competent to do the same at any time after he qualified. Whether, under those regulations, time ceased to run against the estate, from the death to the date of the qualification of the administrator, is not necessary in this case to determine. In any event the time would again run from the date when the administrator got actual notice of decedent's claim, to wit, on December 15, 1882. Treating that date, for the purposes of this case, as the point from which time again commenced to run against the estate, the administrator then had five months and twenty-two days within which to make payment for the land, and that period expired in June, 1883. Payment was not offered until September following, and in the meantime a valid adverse claim had attached. The right of purchase under the law was therefore terminated.

I am therefore of opinion that the decision of your office holding for cancellation the entry of Foster was erroneous, and it is accordingly reversed. The final proof of Foster will be examined, and if found to comply in all respects with the law will be received.

PRACTICE—NOTICE BY PUBLICATION.

PANKONIN v. CROOK.

Service by publication of notice is authorized on due showing that personal service cannot be made.

A non-resident will not be heard to say that due diligence was not used to secure personal service.

Acting Secretary Muldrow to Commissioner Sparks, March 3, 1887.

On February 28, 1884, Thomas A. Crook made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 26, T. 12 N., R. 39 W., North Platte, Nebraska. On March 3, 1885, Carl L. Pankonin initiated contest against the same, alleging that claimant "has failed to break or cause to be broken five acres of said tract within the first year from the date of said entry, and has failed up to the present time to improve in any way." The record further shows that notice issued fixing the hearing before a notary public at Ogalalla on May 1, 1885, and the final hearing at the local land office on May 5. On the latter date neither party appeared, and the case was dismissed. Contestant appealed, and on his showing that the local officers had failed to issue a commission to said notary, your

office, by letter of June 16, 1885, re-instated the case, and remanded it "for further proceedings upon due notice." A commission was issued authorizing the aforesaid notary to take the testimony on August 10, 1885, and fixing August 17 as the day of trial at the local office. Notice by publication was then given. Testimony was regularly taken on the day appointed, and showed that claimant had altogether failed to break any of said tract up to March 2, 1885, but that ten acres were broken, after initiation of contest, on or about April 7, 1885. The local officers decided in favor of contestant, claimant failing to appear. On September 5, 1885, claimant filed in the local office certain "objections to the jurisdiction," setting forth: "(1) No service of notice of said contest has ever been had upon claimant. (2) No affidavit for service by publication has ever been filed as a basis for constructive notice as required by law." It was further stated on oath that claimant resides in the State of Illinois, that he received no notice directly or indirectly of the contest until after said hearing was had, and then "by accident," and that he has a good and valid defense.

The manner of the service of the first notice is not apparent from the record, but is not material in this case. An affidavit by contestant, dated March 3, 1885, contains the following allegations: "That he has made diligent inquiry in the neighborhood of the land in dispute, and among those who would be most likely to know of the whereabouts of the claimant, and has not been able to find his address, or place of residence; that he believes said claimant is not a resident of said State, and that personal service can not be had on him in said State." This affidavit was forwarded with the register's letter of May 29, 1885, and it is presumed was filed on or about the day of its date, although it bears no file marks. This affidavit seems to comply with the requirements of rule of practice No. 11, that "Notice may be given by publication alone, only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service can not be made," and forms a good basis for service by publication. As claimant now admits that he was not a resident of the State of Nebraska, he can not be heard to say that contestant has not used due diligence in attempting to secure personal service. Rule 9 provides that "Personal service shall be made in all cases when possible, if the party to be served is resident in the State or Territory in which the land is situated."

I am of opinion that claimant was properly served under the rules and is therefore bound by the allegations in evidence. The decision of your office, dated October 16, 1885, is for the reasons herein expressed affirmed.

FINAL PROOF—CLERKS OF COURT IN DAKOTA.

CLARK S. ROWE.

Clerks of court in Dakota, elected under the act of March 7, 1883, in counties where no court is held, are officers authorized to take final proof in homestead and pre-emption cases.

Acting Secretary Muldrow to the Attorney-General, March 4, 1887.

I have the honor of transmitting herewith a letter from the Commissioner of the General Land Office of August 5, 1886, enclosing one from the United States district attorney for Dakota to Clark S. Rowe of July 15, 1886, also a letter from the Commissioner of the General Land Office of January 20, 1887, enclosing letter of Register John A. Rea of January 15, 1887. These letters have reference to the authority of clerks of the court in counties in Dakota, where no court is held, to take final proof in homestead and pre-emption cases.

This question was considered by Secretary Teller in a letter to Commissioner McFarland of March 31, 1884 (2 L. D., 200), in which he held that clerks appointed under section I, chapter XIV, of the code of Dakota (page 340), "are officers before whom proof may properly be made, as provided by the acts of Congress of March 3, 1877 (19 Stat., 403), and the act of June 9, 1880 (21 Stat., 69).

The section of the code of Dakota above referred to provides:

"The judges of the district courts respectively shall have the power to appoint a clerk of the district court in each of the counties of his district, who shall be a resident of the district and a qualified voter thereof, who shall procure and keep a seal of the court for that county, and when courts are appointed therein shall perform all duties pertaining to that office, and shall keep his office at the county seat of his county."

The code of Dakota provides for subdivision of judicial districts and the holding of a district court therein at the county seat of one of the counties composing said judicial district. At the time the section above referred to was in force, some of the subdivisions consisted of as many as fifteen counties.

Secretary Teller construed this section as authorizing the appointment of a clerk of the district court in each county of the district, who was required to perform certain duties pertaining to his office and authorized to exercise certain functions by virtue of his office, and that when a court is appointed to be held in the county for which said clerk is appointed, he shall perform *all* the duties of the office, that is, as custodian of the records and the duties of the office in connection with the trial of cases in court.

The decision referred to by the district attorney, that a clerk of court in counties where no court is appointed to be held is not a clerk of a court of record within the meaning of the law regulating declarations of intention for naturalization, does not in my opinion conflict with the

decision of Secretary Teller, because such declaration is a matter of record, and the law contemplates that it must be made before an officer charged with the duty of recording it and having charge of the records of a court, but it does not follow that clerks of the district courts of counties in which no courts are held can not perform other acts and duties by virtue of their appointment, and especially to administer oaths, because the first section, chapter 20, of the Revised Code, declaring what officers are authorized to administer oaths, embraces "Clerks of the supreme and district courts and their deputies, within their respective counties."

I therefore concur in the opinion of my predecessor that final proof in homestead cases may be made before clerks appointed under section 1, chapter XIV code of Dakota.

It appears, however, that this chapter was repealed March 7, 1883, and in lieu of it the law provides that—

"There shall be elected at the same time as provided in this act for the election of district attorneys for each organized county, in this territory, a clerk of the district court, who shall be a resident of the county for which he is elected and a qualified voter thereof, and shall possess the necessary qualifications for holding office, as provided in section 47, chapter XXVII, of the Political Code."

Section 2 then provides—

"Said clerks of the district court shall qualify within ten days after receiving their certificate of election, and immediately after qualifying shall enter upon the discharge of the duties of their offices."

The only change made by the act of March 7, 1883, seems to be in providing for the election instead of appointment of said clerks by the judge of the district court.

I am therefore of the opinion that said clerks are officers before whom final proof may be made, as provided by acts of Congress of March 3, 1877, and the act of June 9, 1880.

RAILROAD GRANT—TERMINAL LIMIT.

NORTHERN PAC. R. R. CO.*

By the terms of this grant the road was divided for the purposes of boundary and patent into sections of twenty-five miles.

The line fixing the terminal limit of the grant should be run at right angles to the general course of the last section.

Assistant Secretary Jenks to the Secretary of the Interior, August 13, 1885.

In conformity to your request that I should investigate the legal principles involved in the matter of the terminal limit of the Northern Pacific Railroad at Wallula, I have the honor to submit the following:

This is an appeal by the Northern Pacific Railroad, by its attorney, from an order of Commissioner Sparks of the Land Office, dated the

* Omitted from Vol. IV.

11th day of April, 1885 (3 L. D. 478)* by which an order made by Acting Commissioner Harrison, of the 20th day of March, 1885, changing the terminal limit of the land grant to the railroad on the east side of the line of the road, was revoked. The change would include in the grant about ninety-seven thousand acres of land south of the present and former limit.

The principal error assigned on the appeal is:—

“The Commissioner erred in not directing that the terminal limits should be in a line at right angles to the general course and direction of the road, or the general course and direction of the road between Wallula Junction and Spokane Falls in Washington Territory, the latter being the nearest point at which terminal limits have been previously adjusted.”

This is an appeal, not from an order fixing the terminal limit, but from an order revoking an unexecuted order, by which a former order fixing the limit was changed, and a new limit fixed. If the new limit be wrong, then the order of revocation should be sustained.

Considered first only in the light of the Congressional grant, the question to be decided would be: Where is the terminal limit of the grant of the United States to the Northern Pacific Railroad, at the South-western terminus as now established by the railroad company at Wallula, in Washington Territory.

If it be conceded that the railroad may lawfully stop at that point—which will neither be discussed, nor decided—then, one point in the terminal line is fixed at the terminus of the road.

The inquiry then becomes a question of boundary, with one point in that boundary fixed. As the two side lines, or lateral limits are fixed by the grant and the middle point of the end line fixed, the only remaining point to be determined is: What is or should be the course of the end or terminal line. If the course of the end line has been already established, the investigation is then narrowed to the solution of the question as to where the line has been fixed.

If it has not been already fixed by the action of the government by its authorized officers, and the railroad company, by the action or assent of its authorized agents, it would then devolve upon the government to decide where it should be established by the terms of the grant.

The material parts of the grant are the following provisions of the third section act of the 2d day of July, 1864 (13 Stat., 367).

“There is granted to the Northern Pacific Railroad Company every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claim or rights

* See 3 L. D. 450.

at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

By the fourth section of the grant it is enacted :

"That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed, in a good, substantial and workmanlike manner, as in all other respects required by this act, the Commissioners shall so report to the President of the United States; and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated opposite and coterminous with said completed, section of said road And so, from time to time, whenever twenty-five additional consecutive miles shall have been constructed."

From these provisions, as the railroad company completed each consecutive twenty-five miles of road, upon report of the commissioners, the grant must be confirmed by patents for the land on each side of the road corresponding with the section of the road completed. If it is to be confirmed by patent, as each twenty-five miles is constructed, a determination of boundary must precede the patent, the presumption would arise that either at or before the time the inspection was made, the law contemplated that the terminal limit of the twenty-five miles inspected was to be fixed. By the provisions of the grant, such inspection would fix the terminal limit of land to be patented and thus, for purposes of patenting, the road as constructed, would be divided in patenting sections of twenty-five miles each, the boundary of each of such sections fixed at or before the time of inspection.

The grant then having divided the road into sections of twenty-five miles for purposes of boundary and patenting, in fixing the boundary of this last section by the provisions of the grant alone; (excluding all extraneous facts,) as the courses of the road are various, some general course must be adopted from which to fix the terminal line.

The subject of the course to be fixed was considered in a decision rendered by Secretary Thompson, on the 23d of February, 1858, reported in 1st Lester, page 527, also in the case of the Flint and Pere Marquette Railroad, by Secretary Kirkwood, on September 1, 1881 (1 L. D., 408); and also was incidentally discussed by the supreme court of the United States in the case of the United States *v.* the Burlington & Missouri River Railroad, (8 Otto, 334). The substance of the rulings in the several cases is: "The land is taken along such line in the sense of the statute, when taken along the general direction or course of the said road within lines perpendicular to it at each end."

Then if this rule is to be applied (as it has been already shown, only the last twenty-five miles of the road under the terms of the present grant can be considered) the terminal line should be run at right angles to the general course of the last twenty-five miles of the road.

Thus far the question has been discussed only under the terms of the grant. But since the grant, certain action has been had, which would on this question seem to be entitled to some consideration.

On the 4th day of October, 1880, a map of definite location as fixed by the company from Spokane Falls to Wallula was approved by the Secretary and filed. On the 16th of August, 1881, Commissioner McFarland fixed the terminal limit at Wallula, by the general course of the last twenty miles, filed a map of the land to which the railroad company was entitled, with the limit fixed and marked thereon, and with a letter of instructions forwarded a copy of the map to the land office at Walla Walla. To this map and definition of boundary no objection seems to have been made by the company till after the 11th day of April, 1885, at which time the order asked to be revoked in these proceedings was made.

On the 20th day of March, 1885, Assistant Commissioner Harrison (at the instance of persons who claimed to have acquired rights under the railroad company, south of the limit fixed by Commissioner McFarland) ordered a change of the limit of the 16th of August, 1881, on the eastern side of the railroad line about twenty six degrees, making it a due east and west line, thereby throwing the limit further south and enlarging the area of the grant of the railroad, about ninety-seven thousand acres, and furnished a plat of such change with a letter of instructions to the land office at Walla Walla.

On the 11th day of April, 1885, Commissioner Sparks revoked the order of Commissioner Harrison and restored the line as fixed by Commissioner McFarland. Notice of this revocation was communicated to the officers of the Walla Walla land office by letter and telegram on the 11th day of April, 1885.

It does not appear that any intervening rights accrued to any one between the act of Acting Commissioner Harrison and the revocation by Commissioner Sparks. On the 21st of July, 1885, the Northern Pacific Railroad Company, by its attorney and general counsel, appealed from the decision of Commissioner Sparks, revoking the order of Commissioner Harrison, and restoring the terminal limit as fixed by Commissioner McFarland on the 16th of August, 1881.

On the argument of this appeal, Mr. Morrison, who appeared to represent "a number of settlers and others," and who on their behalf, on the 12th of March, 1885, had filed a memorial asking for change of the terminal limit, but who took no formal appeal, urged the change as made by Acting Commissioner Harrison, on the ground that they had settled upon the land south of the limit as established on the 16th of August, 1881, and held under the grant to the railroad company, and that great injury would be done these settlers if the grant was not enlarged to include the lands then settled upon.

As the order of Commissioner Harrison, of the 20th of March, 1885,

enlarging the limit was wrong, then the order of Commissioner Sparks of the 11th of April, 1885, revoking that wrongful order, was right.

The only question then that was to be determined being, was the order of the 20th of March erroneous? It is concluded, 1st, The basis of that order was erroneous, in that, instead of taking the general course of the last section of twenty-five miles, as required by the statute, the whole length of one hundred and ninety miles from Spokane Falls is taken arbitrarily as the general course of the line to which the limit was drawn at right angles.

The order was erroneous, in that, while it left the railroad on the west side of the line of the road the full benefit of the limit, as fixed on the 16th of August, 1881, it gave it on the east side about twenty-seven thousand acres, additional land.

The order was erroneous, in that it made the southern terminal limit through the terminus at Wallula a broken instead of a straight line, and included in the grant ninety-seven thousand acres more land than would have been included by a straight line.

The order was erroneous, in that the petitioners, at whose instance the change was made, not being authorized to represent the railroad, was made without sufficient parties on record to justify the action of the Commissioner.

The fact that the alleged settlers bought from the railroad company that which did not belong to the railroad company, but was the property of the government, would not furnish any substantial equity which the Commissioner of the Land Office should have recognized. It was not shown that the officers of the land office authorized to represent the government did any act, or neglected any duty, by which the settlers were misled.

A recognition of the doctrine, that a purchase from one who had no title, would establish an equity against the real owner, would be subversive of all principle. I think, therefore, the position of the appellant is untenable.

DECISION OF SECRETARY LAMAR.

AUGUST 15, 1885.

Upon consideration, the errors, assigned as ground for appeal, are overruled, and the order of Commissioner Sparks, of the 11th day of April, 1885, is affirmed.

On application of the proper party, the subject of readjusting the limit, according to the principle above indicated, might with propriety be considered.

SWAMP LANDS—INDEMNITY.

STATE OF LOUISIANA.

As to lands that were granted to the State by the act of 1849, the purchasers are entitled to protection and the State to indemnity, where such lands were sold by the United States between the 2d of March, 1849, and the 28th of September, 1850; but as to such as were excepted out of the grant of 1849, and were first granted by the act of 1850, the State is only entitled to indemnity after the passage of the latter act.

Acting Secretary Muldrow to Commissioner Sparks, January 19, 1887.

On examining the appeal of Van H. Manning, Esq., as agent for the State of Louisiana, from your decision of February 12, 1886, "refusing to allow said State indemnity for swamp lands sold in said State between March 2, 1849, and September 28, 1850," doubts arose in my mind as to the proper construction of the swamp land grants of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519), and also the indemnity acts of March 2, 1855 (10 Stat., 634), and of March 3, 1857 (11 Stat., 251); and the matter was referred by me to the Hon. Attorney General of the United States for his opinion in the premises. That opinion has been received and on consideration of the same I concur in the views therein expressed, accordingly reverse your judgment in said case, and decide, adopting the views and language of said opinion, "that as to such lands as were granted to Louisiana by the act of 1849 the purchasers are entitled to the protection, and the State to the indemnity, for any such lands as were sold by the United States between the 2d of March, 1849, and the 28th of September, 1850, but as to such as were excepted out of the grant of 1849, and were first granted to Louisiana by the act of 1850, being the lands fronting on rivers, creeks, bayous, watercourses, &c., the State is only entitled to an indemnity after the passage of the act of September 28, 1850."

Herewith are sent the papers in the case, transmitted by your letter of March 16, 1886, and also the opinion of the Attorney General, above referred to.

OPINION.

Attorney-General Garland to the Secretary of the Interior, January 11, 1887.

Your letter of the 15th of December, 1886, submits whether, under the provisions of the act of the 2d of March, 1885, and the act of the 3rd of March, 1857, known as the swamp land indemnity acts, the State of Louisiana is entitled to indemnity for such swamp lands as were sold by the United States between the 2d of March, 1849, and the 28th of September, 1850.

On the 2d of March, 1849, the United States granted the State of Louisiana "the whole of the swamp and overflowed lands within her

borders owned by the United States at that time except lands fronting on rivers, creeks, bayous, watercourses, etc., which had been surveyed." (9 Stat., 352.)

On the 28th of September, 1850, (9 Stat., 519) an act was passed of substantially the same tenor and effect, known as the Arkansas swamp land act, which, by the fourth section applied to each of the other States of the Union in which swamp and overflowed lands existed, without the exception contained in the act of 1849 as to lands "fronting on rivers, creeks, bayous, watercourses, etc." This last act was substantially a re-enactment of the act of the 2d of March, 1849, so far as Louisiana was concerned, with an extension of the grant in that act so as to include the lands which had been excluded by the exception in the former enactment, as to which it was a new and substantive grant on the 28th of September, 1850. Both of these acts were grants *in presenti* by which, from their respective dates, the title to the lands therein described became vested in the several States. *Railroad v. Smith*, (9 Wall., 95); *French v. Fyan et al.*, (93 U. S., 169); *Emigrant Co. v. County of Wright* (97 U. S., 339); *Martin v. Marks* (97 U. S., 345); *Gaston v. Stott* (5 Oregon, 48); *Fletcher v. Pool* (20 Arks., 100); *Hempstead v. Underhill*, *Ib.* 346); *Branch v. Mitchell* (24 *Ib.* 431); *Daniel v. Purvis* (50 Miss., 261).

Notwithstanding these grants of the swamp lands to the States, by which they became the owners of the lands and the United States had been substantially divested of ownership, and could convey no title thereto, after the passage of the respective acts, through some inadvertence or negligence of the officers of the United States, some of the swamp lands to which the United States had no sufficient title were sold to pre-emptors and others, and the consideration was received therefor. Although the United States could not be legally held as a warrantor as to the defective and void title thus conveyed, yet in equity and good conscience she would be bound to refund to each purchaser the purchase money received for the land. But, as many such purchasers had improved their lands, full justice could not be done them by the mere return of the purchase money. The States at any time could assert their title and eject the purchasers. To avoid this injustice, and invest the purchasers with titles to the homes they had made under a void purchase from the United States; on the 2d of March, 1855, Congress passed an act entitled "An act for the relief of purchasers and locators of swamp and overflowed lands" (10 Stats., 634). This statute is remedial, and should be interpreted liberally so as to include whatever is within the mischief intended to be remedied. (Potter's Dwaris, 207). The substance of the remedy was that the United States, instead of refunding to the purchasers the money which she unjustly obtained from them, would pay it to the States who held the title and owned the land, and thereby save the land with its improvements to the purchasers, and indemnify the States for their loss with the money received.

The second section, being the indemnity clause of the act is as follows:

"That upon due proof by the authorized agent of the State or States before the Commissioner of the General Land Office that any of the lands purchased were swamp lands within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to the said State or States; and where the land has been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount upon any of the public lands subject to entry at \$1.25 per acre or less, and patents shall issue therefor upon the terms and conditions enumerated in the act, provided, however, that the decisions of the Commissioner of the Land Office shall be approved by the Secretary of the Interior."

The first clause of this section provides that "Upon due proof that any of the lands purchased were swamp lands, within the *true intent and meaning* of the act aforesaid, the purchase money shall be paid over to the said State or States." The words "of the act aforesaid", above cited, refer to the act of the 28th of September, 1850, as shown by the preceding section. Whenever the lands were within the intent and meaning of the description of swamp lands as contained in the act of 1850, the purchasers were entitled to the protection and the State to the indemnity of the act of 1855. The description of swamp lands under the act of 1850 is found in the third section and is:

"All legal subdivisions the greater part of which is wet and unfit for cultivation; or when the greater part of the subdivision is not of that character, the whole shall be excluded therefrom."

In the act of 1849 the description of swamp lands is:

"Subject to overflow and unfit for cultivation, all legal subdivisions the greater part of which is of that character shall be included—but when the greater part of a subdivision is not of that character the whole shall be excluded therefrom."

These definitions of swamp lands in the acts of 1849 and 1850 are substantially the same. Therefore all swamp lands granted by the act of 1849 would be within the intent and meaning of the words "swamp lands" in the act of 1850. The consideration for the grants in the acts of 1849 and 1850 was the same. The errors committed by the officers of the United States against both grantees were the same in effect. The wrongs done to both classes of purchasers were the same. If Congress had intended to remedy the wrong and to relieve only the purchasers who had purchased from the United States, titles granted to the States by the act of 1850, and leave those who stood in exactly the same relations, under circumstances exactly similar, to the mercy of the State of Louisiana, or purchasers from her, doubtless, instead of using the language "within the intent and meaning of the act aforesaid," such unjust discrimination against those purchasers would have been indicated by fit words, such as "granted by the act aforesaid," or some other

equivalent language. No such language is found in the act of 1855. On the contrary the language which is used is equivalent to "all who are subject to the same mischief shall have the benefit of the same remedy." The "intent" of the act was to give a good title to those to whom the United States had sold such lands, and the "meaning" was to indemnify the States by giving them for their lands she had sold the purchase money she had received therefor, and thereby do justice to both.

This view is enforced by legislative interpretation by the act of the 3d of March, 1857, (11 Stat., 251) by which the titles under the acts of 1849 and 1850 are confirmed as on the same footing; and by the proviso thereto the act of 1855 is extended to the third day of March, 1857, as to both as follows:

"Provided, however, that nothing in this act contained shall interfere with the provisions of the act of Congress entitled 'an act for the relief of purchasers of swamp and overflowed lands, approved March 2, 1855,' which shall be and is hereby continued in force and extended to all entries and locations of lands claimed as swamp lands made since its passage."

It is scarcely conceivable that Congress would extend the act of 1855 from the 2d day of March, 1855, to the 3d day of March, 1857, as to lands in Louisiana, unless those lands, within the "intent and meaning" of the act of 1855 were embraced in that act. It is ruled in a well-considered opinion of Attorney-General Speed, found in 11 Opins., 472, that the proviso to the act of 1857 should be interpreted as though attached to the act of 1855. If so attached, the language "an act approved March 2, 1855 shall be and is hereby continued in force and extended to *all* entries and locations of *lands claimed as swamp lands* made since its passage" must certainly embrace lands granted to Louisiana by the act of 1849. The departmental interpretation, which is entitled to great weight, has, in principle, been conformable to this view of the statute. In 3d Land Decisions, p. 396, an opinion of the Commissioner of the Land Office, approved by the Secretary of the Interior, dated 12th of February, 1885, is found, which decides that the indemnity act of 1855 was applicable to Louisiana as to land granted to that State by the act of 1849, sold by the United States, since the act of 1850. If that indemnity was payable to the State as to any of the lands granted by the act of 1849, the same principle would apply as well to those which were sold by the United States before 1850 as those that were sold after; if the act of 1855 applied to any of the lands conveyed by the act of 1849 to Louisiana, it must, on the same principle, apply to all, for, as to such lands, the title was as fully vested in the State of Louisiana before the passage of the act of 1850 as it was after. Hence, it is concluded that as to such lands as were granted to Louisiana by the act of 1849, the purchasers are entitled to the protection and the State to the indemnity for any such lands as were sold by the United States between

the 2d of March, 1849 and the 28th of September, 1850, but as to such as were excepted out of the grant of 1849, and were first granted to Louisiana by the act of 1850, being the lands fronting on rivers, creeks, bayous, watercourses, etc., the State is only entitled to an indemnity after the passage of the act of the 28th of September, 1850.

MINING CLAIMS—APPLICATION.

CIRCULAR.

*Commissioner Sparks to surveyors-general and registers and receivers,
February 16, 1887.*

The provisions of circular N, of May 11, 1885 (3 L. D., 542) are hereby extended to all cases in which application for patent was filed and publication commenced prior to the receipt by the register and receiver of circular N, of December 4, 1884 (3 L. D., 540).

Approved:

H. L. MULDROW,
Acting Secretary.

RAILROAD GRANT—DETERMINATION OF LIMITS.

SCOTT v. KANSAS PACIFIC RY. CO.

The actual road as made or located is the measure by which the locality and quantity of the grant is to be ascertained and determined.

The lateral limits of a grant are determined by drawing lines on each side of the route of the road through a series of points, at the precise distance therefrom of the width of the grant, on tangential lines to arcs having a radius equal to the width of the grant on each side of the route.

By this system any point on the lateral limit will be distant the length of such radius from some point on the road as located.

Secretary Lamar to Commissioner Sparks, March 10, 1887.

On January 28, 1884, Leander Scott made application to enter under the homestead law the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 29, T. 18 S., R. 5 W., Salina, Kansas. His application was rejected by the register, "for the reason that the land as shown by the records of this office is within the grant to the Kansas Pacific Railway Company;" whereupon Scott appealed to your office, alleging that "the tract applied for is by actual measurement more than twenty miles from the line of said road." On January 22, 1884, your predecessor affirmed the action of the register, holding that the tract in question "is within the limits of the grant as adjusted," and that the limits would not be re-established. The case came on appeal to this Department, and on application by the attorney for Scott was afterwards remanded to your office by the Assistant Secretary for further investigation and report.

By letter of April 30, 1886, you transmitted to this Department your recommendations in the premises, to the effect that (1) Scott be permitted to enter the tract, and (2) "that the limits of the withdrawal heretofore ordered for the benefit of said road be adjusted so as to conform to the true limits of the grant as herein set forth."

Said letter further states:

"The tract in question is within the twenty mile limits of the withdrawal ordered June 14, 1867, on map filed May 8, 1867, as map of definite location of the Kansas Pacific Railway between Fort Riley and Fort Harper, and should the system of measuring the limits of railroad grants, which has heretofore been followed in this office, prevail, it would undoubtedly fall within the limits of the grant, and as it was vacant public land at the date of the definite location of the road, would have enured to the railroad company. . . . An examination of this system having convinced me that the effect thereof was to include within the limits of the railroad withdrawals lands which it was not the intention of Congress to grant, I have formulated a system of measurement by which, in my opinion, the true limits of the several grants, as defined in the granting acts, can be accurately ascertained."

It is thus proposed to abandon the established system of adjusting the limits of grants for railroads, and to adopt a new system.

The present system had its origin in the adjustment of the grant made September 20, 1850, to the States of Illinois, Mississippi and Alabama for a railroad from Chicago to Mobile. (9 Stat., 466). That grant was "for six sections in width on each side of said road." In a letter dated May 29, 1852, Acting Commissioner Wilson thus describes the system adopted by the General Land Office in that instance:

"Taking the entire route as set forth by the surveyor-general, this office has prepared special connected maps preliminary to the final adjustment of the grant. To those maps the route of the road has been transferred, and thereon . . . have been laid down with great care . . . the six mile lateral limits on each side thereof, to wit, by drawing lines on each side of the route of the road through a series of points precisely six miles distant therefrom, on tangential lines to arcs of six miles radius, on each side of the route, every point of which will be six miles from some point on the route."

This method of ascertaining and fixing the lateral limits of railroad grants has been followed invariably since 1852.

The system proposed by your said letter is described therein substantially as follows:

The line of the road as definitely fixed is laid down upon a sectionized diagram of the public surveys, and a *direct line* is drawn connecting its termini. The terminal limits are then found by drawing lines through the termini, at right angles to said direct line. The lateral limit at any given point will be found by drawing a line from the road as located, the length of which shall be equal to the width of the grant for one side of the road, but always at right angles to said direct line. The lateral limit will pass through the extremity of such line.

Applying this system to the Kansas Pacific Road, you find that the land in question falls outside the granted limits, and therefore recommend that Scott be allowed to enter the same.

It is clear that the object of a system of measuring the limits of grants of Congress is, to ascertain and indicate upon the government plats and diagrams the exact land intended by Congress to be granted. It is equally clear that the intention of Congress in that regard must be gathered, if possible, from the words of the granting act. The question then arises, will the proposed system ascertain and indicate the lands granted by said act to said railroad company.

The granting clause of the act in aid of the construction of the Kansas Pacific road (July 1, 1862, 12 Stat., 468,) is as follows:

"That there be and is hereby granted to the said company every alternate section of public land, designated by odd numbers, to the amount of five (afterwards increased to ten) alternate sections per mile on each side of said railroad on the line thereof, and within the limits of ten (twenty) miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

Your said letter cited but one authority as sustaining the proposed system, to wit, an extract from an opinion of Attorney-General Crittenden, of March 10, 1852. As there is some difference of opinion as to the meaning of the words used by the Attorney-General, it seems necessary to refer to the circumstances that called them forth.

The opinion was delivered in response to certain questions submitted by the Secretary of the Interior Stuart, by letter of March 9, 1852, in reference to the adjustment of the grant to Illinois in aid of the Central road. The Attorney-General says:

"Your next question respects the quantity of land to which the State of Illinois is entitled under said act to aid in the construction of said road and branches. By its second section it is enacted, 'that there be and is hereby granted to the State of Illinois for the purpose of aiding in making the railroad and branches aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches; but in case it shall appear that the United States have when the line or route of said road and branches is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said State, to select,' etc., in equal quantity from the lands of the United States most contiguous, etc. You inform me that in virtue of this section of the act, 'the State of Illinois claims a quantity of land equal to the one half of six sections in width, on each side of said road and its branches, or 3840 acres for every linear mile of the road and its branches, including all its sinuosities and deflections from a straight line.' You add the expression of your own 'doubt whether the claim to that extent is tenable, and you desire as I understand you my opinion on that point.'"

Then follows the extract quoted in your said letter as in support of the proposed system:

"It is quite clear in my judgment that a claim to that extent is not tenable, and can not according to law be allowed. It is a theory rather than a claim, and has nothing to sustain it in either the intention or language of the act. The imaginary straightening out of crooked lines to furnish a longer base and thereby to increase the quantity of land to the grantee, is at apparent variance with the plain purpose and words of Congress. The statute had reference alone to the actual road as *made or located* with all its sinuosities. The line which that forms is the base line of the land granted on each side of it, and is the object and measure by which its *locality* and *quantity* are to be ascertained and determined." (5 Op., 518).

It seems clear to my mind that the Attorney General decided simply that the State of Illinois was not entitled to 3840 acres for every linear mile of said road, and in support of his opinion urged the fact, that under the statute the actual road as made or located was the object and measure of the locality of the grant, and that as the actual road is the base of the grant, another and a different base could not be made by straightening out, in imagination, the crooked line of the actual road. In this view the opinion of the Attorney General not only does not at all conflict with the present system of determining the limits of railroad grants, but prescribes it. For under the present system the Illinois Central road could not get 3840 acres for every linear mile. Indeed, the grant for the Illinois Central was adjusted according to the present system, within a few days after the rendition of the opinion, by Attorney General Crittenden, in conformity with that opinion and by direction of the then Secretary of the Interior. The attorney for Scott states that said grant was not adjusted by the present system. An examination of the plats shows that he is mistaken.

That the contemporaneous construction of the opinion by the Land Office was in conformity with the views herein expressed is strongly indicated by the fact that the letter of Acting Commissioner Wilson, above quoted, was written but two months after the date of the Attorney General's opinion.

The system proposed in your said letter determines the *quantity* of the grant by a direct line connecting the termini. For said letter states that the effect of the system is, "to bring within the limits of the grant a quantity of land equal to the quantity which would have fallen within the limits had the road been located on a direct line between the termini." This is in conflict with the opinion of the Attorney General, for it makes the "direct line" the measure of the quantity of the grant, while the Attorney General distinctly says the *actual road as made or located* is the measure of the quantity of the grant. I am satisfied therefore that the said opinion of the Attorney General does not support the proposed system.

That system requires that the termini of the road as located be connected by a direct line, and that terminal lines be drawn at right angles

thereto, before the lateral limits can be ascertained. Section four of the act in aid of the Kansas Pacific provides as follows:

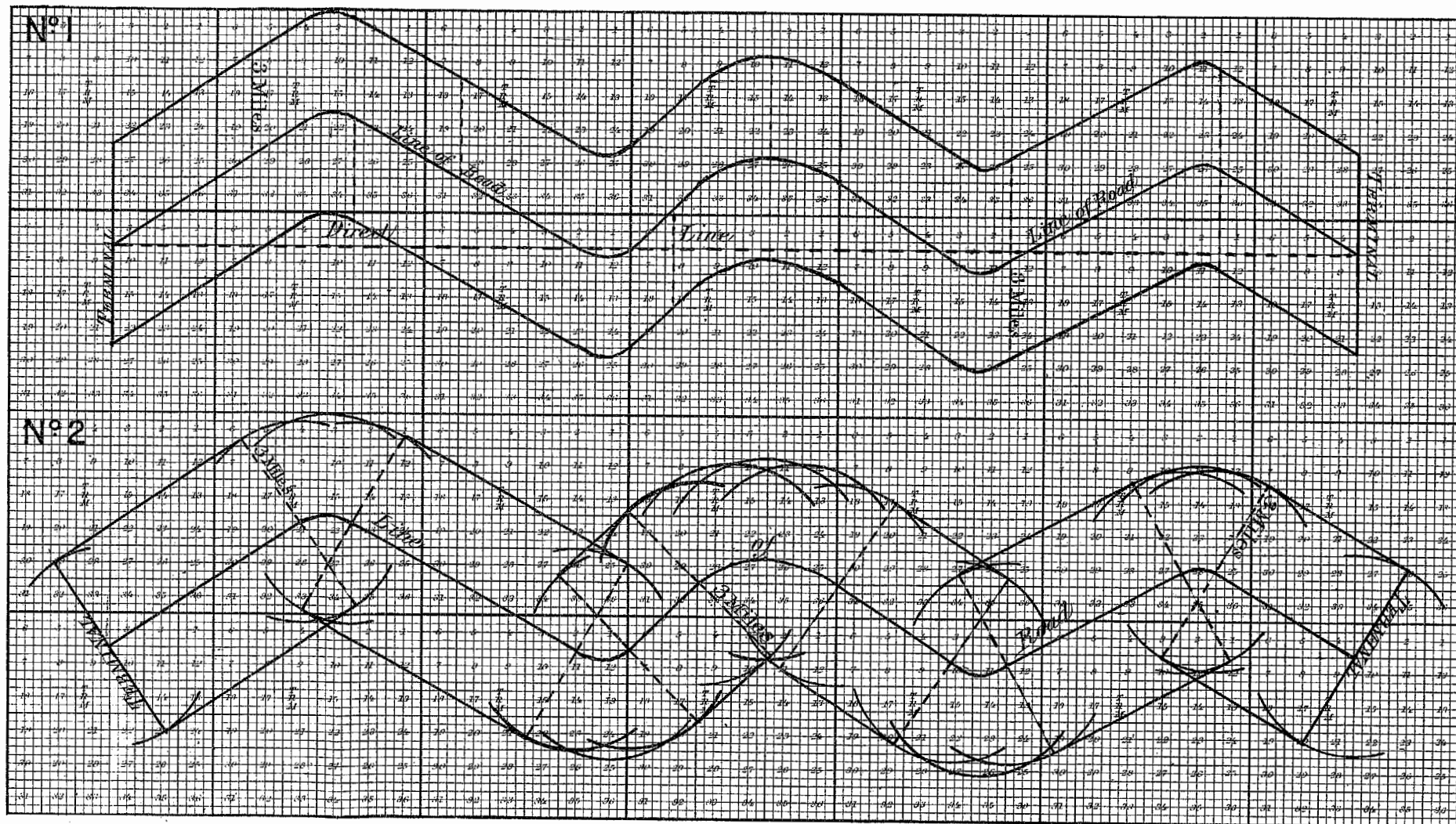
SEC. 4. "That whenever said company shall have completed forty consecutive miles of any portion of said railroad . . . the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then upon certificate of said commissioners to that effect patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid, and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners."

From this section it appears that the company was entitled to patents for land coterminous with sections of forty miles as fast as such sections were certified as completed. Now, the first forty miles of constructed road was accepted by the President of the United States October 28, 1865, at a time when no western terminus of the road existed, or was possible of location under the existing legislation. The western terminus was not located until many miles of the road had been accepted under the law. (Sec. 1, Act of July 3, 1866, 14 Stat., 79). The line connecting the termini could not have been drawn, nor the lateral limits defined at the date when the company's rights attached to a portion of its lands. It appears therefore that the proposed system as enunciated in your said letter could not be applied according to its own terms to the Kansas Pacific road.

Again, under the proposed system, the lateral limits are ascertained by measuring the required distance from the actual road as located, *but always at right angles to a line connecting the termini*. Now, if a portion of a road—say twenty miles—runs at right angles to the line connecting the termini, the lateral limits, for that twenty miles, will coincide with the road itself. In other words, no lands would pass under the grant *for that portion* of the road. I am of opinion this would violate the provision of the grant for the Kansas Pacific road, "of every alternate section of public land designated by odd numbers *to the amount* of five (ten) alternate sections *per mile* on each side of said railroad on the line thereof, and *within the limits of ten (twenty) miles on each side of said road*."

From the foregoing it seems clear that the proposed system can not be applied in the adjustment of railroad grants, and is therefore rejected.

The present system has been in continuous operation since 1852, and under it all railroad grants have been adjusted; it has been acquiesced in by Congress, and by all interested parties during that period; and titles to millions of acres have passed under that construction. But independently of these considerations, I agree with the opinion of the Attorney General that the actual road as made or located is the measure



by which the locality and quantity of the grant is to be ascertained and determined, nor can I find any warrant in the act under consideration, or in any other enactment of Congress, for substituting an air line connecting the termini, as a basis for such measurement.

After the most careful examination of the questions involved, I conclude that the present system of adjusting the limits of railroad grants is in conformity with said opinion of Attorney General Crittenden, and with the law.

The original decision rejecting the application of Scott is therefore affirmed.

It has been urged herein that a railroad should not be allowed to diverge unnecessarily from a direct route, and thereby increase its grant. While this is undoubtedly true, the question whether the Kansas Pacific, or any other land-grant railroad has departed unnecessarily from a direct route is not presented in this case. I therefore express no further opinion on that point.

In order to illustrate the practical working of the proposed system and of the present system, I have attached hereto a plat of the public surveys, on which is laid down an imaginary line of road having a grant of three sections in width on each side thereof. Figure No. 1 represents the adjustment under the proposed system, and No. 2 the adjustment under the existing system on the same line of road.

RAILROAD GRANT—SETTLEMENT RIGHT.

SCHETKA *v.* NORTHERN PAC. R. R. CO.

The settlement right of a pre-emptor existing at date of definite location defeats the operation of the grant, though the settlement was on offered land and the pre-emptor had, prior to such location, failed to make proof and payment within the statutory period.

Acting Secretary Muldrow to Commissioner Sparks, March 12, 1887.

By letter of April 1, 1881, your office held for cancellation the homestead entry of James Schetka, made February 5, 1878, for the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 13, T. 130, R. 33, St. Cloud, Minnesota, for the reason that the tract is within the twenty mile limits of the grant to the Northern Pacific Railroad Company, the right of which attached November 21, 1871. The tract fell outside of the withdrawal on general route. Schetka failed to appeal. By your office letter of October 10, 1881, said decision was declared final, and the entry canceled. Afterwards, on a showing made by Schetka, your office, by letter of December 28, 1883, rescinded its action of October 10, 1881, and allowed Schetka sixty days within which to appeal from said decision of April 1st. That appeal is now before me.

It appears that the tract is within the twenty mile limits of said road as shown by the map of definite location, filed November 21, 1871, and that the right of the company attached, if at all, at that date.

The records of your office show that said township 130 N., range 33 W., was offered at public sale October 24, 1864, and that on November 12, 1870, one Mathias Barth filed pre-emption declaratory statement for all of said SW. $\frac{1}{4}$, alleging settlement on the 5th of that month.

The grant was for land " free from pre-emption or other claims or rights at the time the line of said road is definitely fixed" (13 Stat., 365).

The only question presented by this case is, whether the tract at the date of definite location was free from a pre-emption claim or right. Barth alleged settlement of November 5, 1870 and as the settlement was on offered land, was required to make proof and payment within twelve months from such settlement, and in case of failure so to do the tract became subject to the entry of any other purchaser. (5 Stat., 457, Sec. 15).

Barth failed to make proof and payment, and it is contended by the company that his right expired at the end of one year from settlement, and that there being no claim to the land at the date of definite location that could be asserted under the law, the company's rights attached.

I am unable to wholly agree in this conclusion. The year during which Barth was protected by his filing expired November 5, 1871, and the road was definitely located on the 21st of the same month. If Barth remained as a settler on the land up to or past the date of definite location, I know of no law or construction of law that would forfeit his right in favor of the company. The filing of the declaratory statement on offered land is for the protection of the settler, and insures the settler against the sale of the land during one year after settlement. In case of his failure to purchase during that year the law does not forfeit his right or claim, but merely refuses to protect him longer against the offer of any other purchaser. The Department is not precluded from accepting proof and payment on offered land made more than one year after settlement. (*Walker v. Walker*, 1 C. L. L., 293; *J. B. Raymond*, 2 L. D., 859; Sec. 2264 R. S.)

But the railroad company does not stand in the position of "any other purchaser." It can not be heard to plead against a settler on public land under the pre-emption or homestead laws, that he has failed to perform his obligations to the government, if his claim has attached at the date of definite location.

Appellant alleges that Barth held said tract under his declaratory statement at said date. To determine the truth of that allegation you will order a hearing, to which the company and claimant will be cited. If the settlement existed at the time of the definite location, the claim of the company is at an end. If, however, the claim of Barth to the

land had ceased at that date, I see no reason from this record why the tract should not be awarded to the company.

You will instruct the local officers to report their finding from the testimony. Said decision is accordingly modified.

PRACTICE—NOTICE—APPEAL; TOWNSITE—LOCATION.

BOGGS v. WEST LAS ANIMAS TOWNSITE.

When notice of the Commissioner's decision is given through the mails, by the local office, seventy days are allowed, from the day when such notice is mailed, within which to file appeal, and this whether appeal is filed through the mail or otherwise.

Mailing notice of appeal and specification of errors by registered letter, within said period of seventy days, is proper service under rule 96 of practice.

The location of a townsite, under State laws, on land temporarily segregated from the public domain, is a valid appropriation as against a subsequent homestead entry.

Acting Secretary Muldrow to Commissioner Sparks, March 14, 1887.

I have considered the case of John M. Boggs v. the Townsite of Las Animas, involving the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 10, T. 23 S., R. 52 W., Pueblo, Colorado, on appeal from so much of your office decision, dated March 9, 1886, as is adverse to Boggs.

It appears that the townsite application was made April 27, 1885, for six hundred and forty acres, including that above described, and that final proof was made and cash entry was allowed by the local office December 9, 1885.

March 17, 1885, Boggs made homestead entry for the SE. $\frac{1}{4}$ of said section ten. The record also shows that one John H. Jay, on the 14th of March, 1885, made timber culture entry for the SE. $\frac{1}{4}$ of Sec. 3, in township and range above described, and that on the 16th of March, 1885, he made homestead entry for the SW. $\frac{1}{4}$ of the same section.

His claims were also in conflict with the townsite application to the extent of one hundred and sixty acres.

Both Jay and Boggs were cited to appear when the final proof was offered in behalf of the townsite. They did appear. All parties were heard, and the register and receiver, by their decision, gave all the land in controversy to the townsite, except the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 3, embraced in Jay's homestead entry, which they awarded to him.

As to the one hundred and sixty acres in dispute between Jay and the townsite, your office by its decision of March 9, 1886, awarded a moiety to each, giving the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 3 to the townsite, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section to Jay. From that decision no appeal was taken by either party, and there is therefore, so far as the controversy between Jay and the townsite is concerned, nothing before me for consideration.

Your office by the same decision held for cancellation the entry of Boggs, in so far that it embraced the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, and awarded said tract to the townsite, upon the ground that it was surveyed and laid off in streets and occupied by the townsite before Boggs went on the land. Said decision reduced the claim of Boggs so as to make his entry one for eighty instead of one hundred and sixty acres. He appealed, and the record is now before me.

A motion has been made by the townsite to dismiss the appeal. Several reasons are assigned in support of said motion. They are in substance (1) that the appeal was not filed within the time prescribed by the rules of the Department, and (2) that notice of said appeal was not served on appellee in time.

It appears from a letter of the register, dated July 14, 1886, that notice of your office decision of March 9, 1886, was received by counsel for Boggs, through the post office, on the 17th of the same month. Appeal from said decision was filed in your office by resident counsel May 21, 1886.

Rule 87 of rules of practice provides that "when notice of the decision is given through the mails by the register and receiver, or surveyor-general, five days additional will be allowed by those officers for the transmission of the letter and five days for the return of the appeal through the same channel before reporting to the general land office." Your office and the Department have uniformly held that the practical effect of this rule is, where notice of decision by your office is given through the mails by the register and receiver, to allow seventy days from the day when such notice is mailed within which to file appeal, and this whether appeal is filed through the mails or otherwise.

Notice of the decision in question was mailed by the register and receiver to the local counsel in Colorado on March 17, 1886, and as has been stated it was received the same day.

Following the construction of the rule above mentioned, the time for the filing of appeal by Boggs expired May 26, 1886. But his appeal was filed in your office May 21, 1886. It was therefore within time.

Rule 93 of rules of practice provides that "A copy of the notice of appeal, specification of errors, and all arguments of either party, shall be served on the opposite party within the time allowed for filing the same."

Rule 94 prescribes that "Such service shall be made personally or by registered letter."

It appears that counsel for appellant on the same day on which they filed the appeal in your office also mailed by registered letter a copy of said appeal and specification of errors to the opposing party.

The registry return receipt shows that the registered letter was received by the mayor of the town of West Las Animas June 8, 1886, but, having been mailed May 21, 1886, which was within the seventy

days allowed for appeal, the service of notice of appeal was within time under the rules, for rule 96 makes proof of mailing by registered letter proof of service so as to save the right of appeal.

For the reasons stated, the motion to dismiss the appeal must be overruled, and the case will be considered on its merits.

The tract in question, it appears, was a part of certain lands patented by the United States in 1873. The validity of the patents so issued was subsequently attacked by the United States, on the ground of fraud practiced in their procurement. Said patents were annulled and vacated under a decree of the supreme court, rendered at its October term, 1884, in the case of *Moffat v. United States*, on appeal by Moffat from the circuit court of the United States for the district of Colorado (112 U. S., 24).

While said patents were outstanding, to wit, in September, 1882, a petition was duly filed under the laws of Colorado for the incorporation of the town of West Las Animas. Certified copies of said petition and the proceedings thereunder show that the town was in October, 1882, duly incorporated in accordance with the laws of the State of Colorado. Its boundaries were by metes and bounds and embraced a portion of the legal subdivisions now in dispute and claimed by Boggs.

Pursuant to the mandate of the supreme court in the cases cited, your office, by letter dated February 27, 1885, to the register and receiver at Pueblo, Colorado, canceled said patents on the records of the land department.

The lands then again became a part of the public domain, subject to entry. Said lands had in a sense been public lands during all the time that the patents were out, but were by the entries and the patents based thereon so segregated from the body of the public domain as not to be subject to entry. Said patents were issued to fictitious parties, and as stated by the supreme court, in the case cited, *supra*, they "could not transfer the title." In the same decision it was said, "a patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one." Almost immediately upon the cancellation of the outstanding patents, Boggs made his application to enter under the homestead law the SE. $\frac{1}{4}$ of said section ten. A few days later the townsite application was made, embracing the N. $\frac{1}{2}$ of the tract covered by the entry of Boggs. The question to be determined is: which of the two claimants has the superior right to the eighty acres in conflict? Upon an examination of the record, I find no difficulty in determining this question.

While the incorporation of the town under the State law was not in its technical sense a selection under the laws of the United States, it was nevertheless a clear indication of the purpose to establish a town, and was the only proceeding possible at the time of the incorporation. The land having been previously patented, and so far as the records

showed, title having passed out of the United States, the town authorities could not then make application for, nor enter, the tract under the townsite laws. They were compelled to rest their location solely upon the laws of the State. This they did, and were accordingly incorporated October 13, 1882.

Not only was the town incorporated at the date March 17, 1885, when Boggs made his homestead entry, but it had been surveyed and laid off into streets and was otherwise improved. The tract in question was included in those thus improved, and was used as part of the town in such a way as to furnish notice to everybody that it was a part of the town. Indeed, it appears that the town has had an existence as such at least since 1877, and has been the county seat of Bent county, Colorado, since 1880. The county jail is on the tract in dispute, and while it is doubtless the property of the county, it appears that it is also used by the town, and it does not seem probable that it would have been erected elsewhere than at the county seat, that is, in the town as incorporated.

Upon a full consideration of the case, I am satisfied that the tract in question was at the date of the application of Boggs to enter settled upon and occupied as a townsite, which fact was a matter of general notoriety. Although the townsite application was not made until a few days after the application of Boggs to make homestead entry, it was made within sixty days after your office letter to the register and receiver notifying those officers of the cancellation of the patents, and apparently with all the promptness which could reasonably be expected of a body acting in its corporate capacity.

This, coupled with the fact that it had for several years had a corporate existence and had occupied and used the land, convinces me that it is entitled to the tract in dispute as land selected as the site of a town, and a portion of which had been included within the limits of an incorporated town.

I affirm the decision appealed from, and return herewith the papers which accompanied your office letter of August 24, 1886.

In the record appears a letter from Messrs. Britton & Gray, calling attention to the fact that a plat of station grounds for the Pueblo and Arkansas Valley Railroad Company in said section 10 was approved by this Department March 13, 1886, under the right of way act of March 3, 1875, and asking to be heard in behalf of said company.

You will advise Messrs. Britton & Gray of this decision, and that they will be heard before your office touching their rights under the approval mentioned by them.

PRACTICE—SERVICE OF NOTICE BY REGISTERED LETTER.

NEW ORLEANS CANAL & BANKING CO. v. STATE OF LOUISIANA.

The transmission of notice by registered letter is *prima facie* evidence that it was received in due course by the party to whom it was addressed.

The written admission of the party to whom notice, by non-registered letter, was sent that he received the same, is proof of service under rule 95 of practice.

Secretary Lamar to Commissioner Sparks, March 14, 1887.

With your letter of the 20th instant you transmitted for my consideration the appeal filed by the State of Louisiana from your decision of October 8, 1886, rendered in the above stated case, together with a motion made by counsel for the bank to dismiss said appeal, upon the ground that no service of said appeal was made by the method provided for by law, to wit, by personal service or registered letter.

This appeal and the motion to dismiss should have been transmitted to the Department with the entire record in the case to be passed upon when the case is reached in its order, but being submitted for my consideration and no reason being shown to the contrary, this preliminary question will now be disposed of.

Notice of your decision was received by the State October 12, 1886, having been mailed that day by the local officers. Rule 87 provides that when notice of the decision is given through mail by the register and receiver, five days additional time shall be allowed those officers for the transmission of the letter, and five days for the return of the appeal through the same channel before reporting to the General Land Office. The time allowed for said appeal did not expire until December 21, the decision and appeal therefrom having been transmitted through the local office.

Rule 93 provides that notice of the appeal and specifications of error must be served on the opposite party within the time allowed for filing the same. Hence, service of the appeal on the attorneys of the bank prior to and including the 21st day of December was within the time prescribed by the rules.

The evidence of service not appearing in the record, you directed the register and receiver to report the facts connected therewith. December 31, they reported that the attorney of the State was notified of your decision October 12, and that appeal therefrom was filed in the local office December 11; that on the 13th day of December they transmitted said appeal to the General Land Office, and on the same day mailed (not registered) a copy of the same to James L. Bradford, Esq., of counsel for the bank, and also to the New Orleans Canal and Banking Company, at New Orleans, Louisiana.

This motion to dismiss is made on the ground that Rule 94 provides only two modes by which service can be made, to wit, personal service

or by registered letter, and that Rule 105 prescribes that all notices shall be served upon the attorneys of record. They allege that they are the only attorneys of record for the bank, and that neither has been served with a copy of said appeal, *either personally or by registered letter*, and that the attorney for the State has not attempted to furnish proof of service, either under Rule 95 or Rule 96. These rules provide that "proof of personal service shall be the written acknowledgment of the party served or the affidavit of the person making the service attached to the papers served, stating time, place and manner of service," and "proof of service by registered letter shall be the affidavit of the person mailing the letter attached to the post office receipt."

Counsel for the bank do not deny that they received the copy of the appeal, alleged to have been mailed to them by the register and receiver December 13, and having notice of this report at the time of filing their motion to dismiss, their failure to deny it might be taken as an admission that they received it.

But conceding that the silence of appellee's counsel should not be construed as an admission that they received the copy of the appeal said to have been mailed to them, the fact that the president of the bank received the copy of said appeal is settled beyond all question; and *this*, under rule of practice 86, constituted sufficient service, whether said counsel received said notice or not. Said rule provides that, "notice of an appeal from the commissioner's decision must be filed in the General Land Office and served on the *appellee or his counsel*," etc. And the affidavit of the president of said "Canal and Banking Company" (defendant), after stating that he has not been served with copy of said appeal, either by registered letter, or personally, says: "I have no notice of said appeal, except that lately I found on a desk in my office a *letter* containing what purported to be an appeal by the State of Louisiana. How this came to my office I can not say, but by the ordinary mail I believe. It was not by registered letter, nor was it given to me personally nor any other officer of the bank."

Here we have not only a *written admission*, but a *sworn admission*, by the "*party served*," of the personal receipt of said notice of appeal, which brings the proof of service squarely within the first subdivision of rule 95, providing, as we have just seen, that "proof of personal service shall be the written acknowledgment of the party served."

The mailing by registered letter is simply *prima facie* evidence of the fact that it was received in due course by the party to whom it was addressed, while the written admission of the party to whom a *non-registered* letter was sent, that he actually received such letter, furnishes proof positive of the fact. And to hold that a notice thus *admittedly* received by non-registered letter was not legally served, solely on the ground that the letter containing it was not registered, would virtually be to sacrifice the substance and spirit of the rule to mere technical form.

The motion is therefore dismissed.

PROCEEDINGS IN STATE AND FEDERAL COURTS.

MISSOURI, KANSAS & TEXAS RY. CO.

Suits in ejectment against settlers, pending in the courts of a State, may not be enjoined by proceedings in courts of the United States.

Acting Secretary Muldrow to Commissioner Sparks, March 14, 1887.

On June 16, 1886, this Department recommended to the Attorney-General that suit be instituted to set aside the patents issued to the Missouri Kansas and Texas Railway Company for certain lands lying in Allen county, Kansas.

I am now in receipt of your office letter of February 28, 1887, stating that you are advised that such suit has been instituted in the United States circuit court, that a certain purchaser from said railroad company has instituted in the district court of Allen county proceedings in ejectment against certain settlers on said lands, that said settlers have attempted to secure a dismissal of the ejectment cases, or a continuance pending a decision of the case in the circuit court, and have failed therein. In view of these facts, you recommend that "the Attorney General be requested to institute proceedings in the United States courts for the purpose of restraining said company, or any one claiming under it, from prosecuting any suits against the settlers upon the lands in question pending the decision in the suit to vacate the company's patents, now pending in the United States circuit court." Said letter further states that the ejectment cases will be tried during the present month.

I am of the opinion that the United States could not successfully maintain an action to stay proceedings in said Allen county court, and therefore decline to make the recommendation as requested. Section 720 of the Revised Statutes provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

DESERT LAND ENTRY—FINAL PROOF.

LEVI WOOD.

The non-irrigation of rocky and hilly portions of the land does not defeat the right of entry, where the claim was made in good faith, and substantial reclamation of the irrigable portion thereof is shown.

Acting Secretary Muldrow to Commissioner Sparks, March 15, 1887.

September 27, 1882, Levi Wood filed his declaration of intention, No. 419, to reclaim the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 25, T. 51 N., R. 82 W., Cheyenne, Wyoming,

under the provisions of the act of Congress approved March 3, 1877 (19 Stat., 377). September 3, 1885, the south half of the claim was canceled for conflict with the prior desert land entry of one Elias Snider, made in 1879, prior to the survey of the township. April 6, 1886, your office rejected Wood's final proof for the remainder of his entry, on the ground that proper reclamation had not been made, but gave him opportunity to submit new proof whenever he could show a satisfactory compliance with the law. Upon review this decision was adhered to by your office June 19 following. Appeal was then brought here and the case has been considered.

It is shown by the record that all of one forty-acre tract has been irrigated, from twenty to twenty-five acres of another, and possibly about fifteen acres or more of the other, making in all about eighty acres out of the entire tract of one hundred and twenty acres. The remaining portion of the entry is hilly and rocky and it is practically impossible to irrigate it. It is alleged by Wood that when he made entry aforesaid, he desired to leave out the two forties which are hilly and take the remaining four forties of the original entry, but was told by the local office that his entry would not be compact within the meaning of the law if said two forties were omitted; and that about the time he was ready to commence the work of irrigation and reclamation, he for the first time ascertained that the entry of Snider covered his three south forties, and learning Snider's claim to be superior to his own, he did not contest for the conflicting portion, but allowed it to be canceled.

While as a general rule the entire tract entered must be reclaimed by irrigation before final proof can be accepted, yet in view of the peculiar circumstances of this case, I am inclined to think that the final proof herein ought to be approved. There is no doubt but that the land embraced in this entry which is susceptible of irrigation has all been irrigated as contemplated by the statute. True, a considerable portion of two forties has not been irrigated and is not susceptible of irrigation. These portions amount to possibly forty acres—claimant in a late brief says from thirty to forty acres—and are practically worthless to the government or to any one else so far as their value as agricultural land is concerned. If the entry at present was as originally made, the part not irrigated would be a very small proportion of it; but as three forties have been canceled without the fault of the entryman apparently, the proportion of unreclaimable land is much larger.

I am of opinion, taking all the circumstances of this case into consideration, claimant's evident and unquestioned good faith in the premises, the fact that one-half of his original entry (all of which part was susceptible of irrigation) has been canceled through no fault of his, and the fact that all but the hilly and rocky portions of the claim have been properly irrigated and reclaimed, and the major part thereof cultivated, that the final proof of Wood should be accepted, and I so direct.

The decision appealed from is therefore reversed.

PRIVATE CLAIM—AUTHORITY OF THE LAND DEPARTMENT.

PUEBLO OF SAN FRANCISCO.

By the issuance of patent the Department is divested of all authority or control over the land or the title thereto.

The head of a Department has no power or authority to revise or reverse the final decree of his predecessor in a matter properly before him.

The "executive duties" of a Department are those required of its officers in the administration of the law upon the subjects under its jurisdiction, though such duties may require in their performance the examination of evidence and the exercise of judgment thereon.

By virtue of statutory authority the Secretary of the Interior is invested with power to review, reverse, annul, amend or affirm all the proceedings in the Department instituted to secure the alienation of any portion of the public lands, or the adjustment of private-land claims.

An order reversing the action of the Commissioner of the General Land Office, in the matter of the survey of a private land claim, is properly within the jurisdiction of the Secretary of the Interior.

The authority of the Secretary to order a re-survey rests in his general and supervisory powers, and may be exercised whether invoked by appeal or otherwise.

Publication of notice is not required by the act of July 1, 1864, in case of a corrected survey made under an order therefor.

Secretary Lamar to Commissioner Sparks, March 12, 1887.

This is an application for the recall and cancellation of the patent of the United States to the city of San Francisco, and for the issue of a new patent with different boundaries, to-wit, the boundaries of what is known as the Stratton survey. From the papers transmitted by the Land Office, and the authorities cited in the briefs of counsel, I learn that the history of this case is as follows:

In July, 1852, the city of San Francisco, as the successor of the Mexican pueblo of that name, petitioned the board of land commissioners of California, created under the act of Congress, March 3, 1851 (9 Stat., 631) for a confirmation of her claim to four square leagues of land situated on the northern portion of the peninsula of San Francisco. After a controversy before the board of land commissioners, and in the courts, for a period of nearly thirteen years, the United States circuit court finally confirmed the claim of the petitioner, to the land therein described, as valid. The following is an extract from the decree:

"The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula *above ordinary high-water mark* (as the same existed at the date of the conquest of the country, namely, the seventh day of July, A. D. 1846,) on which the City of San Francisco is situated as will contain an area of four square leagues; *said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions, namely:* such lands as have been heretofore reserved or dedicated to

public uses by the United States, and also such parcels of land as have been, by grants from lawful authority, vested in private ownership and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming under said grants by said tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. *This confirmation is in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city.*"

On the 8th of March, 1866 (14 Stat., 4) Congress relinquished the land covered by the decree to said city. Thus the title of the city rests upon the decree of confirmation and the act of Congress, both making the city a trustee for the lot-holders and inhabitants thereof.

Upon the confirmation of this grant and its approval by the act of Congress, the next matter for the consideration of the Land Department related to its extent and boundaries. In 1867-'8, under the instruction of the United States surveyor-general of California (Upson) the survey of the claim of the city made by the deputy-surveyor, James T. Stratton, and a plat thereof, were filed in the office of the surveyor-general of the United States for California. Due notice thereof was given in the legal manner, and for the required time, by said surveyor-general. The survey and plat were approved by him but not in the manner and form required by the statute.

Against the approval of said survey the city and county of San Francisco filed their protest and objections thereto, with the evidence in support of the same in due form of law. One of the grounds of protest, the one involved in this inquiry, was that the surveyor did not conform, as required by the statute, to the decree of confirmation, in that he did not follow the line of ordinary high-water mark of the bay, but followed up the tide line, or rather the alleged tide line, on one side and down the other, of Mission creek, a stream which runs into the bay, excluding certain marsh lands lying on Mission creek which ought to have been included in said survey. Said survey and plat, together with the said protest, objections, evidence, field notes and other papers were transmitted by Surveyor-General Day, successor to Surveyor-General Upson, to the General Land-Office at Washington, with his own report thereon in which he disapproved of said survey, expressing the opinion that the said objections were, in several particulars, well taken, and recommended that the plat and survey should be amended, among other things so as to include the marsh lands lying on Mission creek within the four square leagues, which said Stratton survey had excluded therefrom. I give the following quotation from his report:

"And, further, in relation to the above-mentioned survey by Deputy-Surveyor Stratton of the exterior limits of the pueblo lands of San Francisco I express my opinion that they are erroneous

and not in conformity with the decree of the United States court and the act of Congress relating thereto, my reason for this opinion being more fully set forth in a communication to the Commissioner of the General Land Office, dated July 8th, hereto appended."

Speaking of the objections to the exclusion by this survey, of the marsh lands as being below the ordinary tide line, he says: "the affidavits sustain the exception, and I can add to them the fact that in 1851 or 1852 I assisted in surveying a preliminary trial [line] for the San José Railroad across this marsh, and found it to be as described in the affidavits and I have seen no facts around the bay to prove that it has filled up and become tide marsh lands since 1846."

For some reason not explained in anything that I have found in the records, the Stratton survey and plat remained in the General Land Office, unacted upon, for ten years. In the meantime, one Geo. W. Ellis, obtained from a board of tide land commissioners (appointed by the State to take charge of its swamp and tide lands, to sell portions of the same and to compromise with parties in possession thereof,) a quit-claim deed of the State, at the rate of \$4.00 for one thousand square feet, to a tract of land which embraced a considerable part of the lands on Mission Creek, excluded by the Stratton survey. Soon after this C. C. Tripp, a grantee of Ellis, brought suit in the circuit court of the United States of California, to recover a lot included in the said quit-claim deed of the State board. The opinion of the court rendered in this case as reported in 5th Sawyer's report, page 209, was that the lot in controversy was situated within the limits of the tract confirmed by the decree of the circuit court above mentioned, to the city of San Francisco. In this opinion the court said:

"Mission creek never constituted any portion of the bay of San Francisco, any more than the Sacramento river constitutes a portion of the bay of Suisun, or the Hudson river a portion of the bay of New York. Again: "The boundary of that tract (meaning the tract confirmed to the city by the decree,) *runs along the bay on the line of ordinary high-water mark, as that existed in 1846, crossing the mouths of all creeks running into the bay, and that of Mission creek among others.*"

When this matter was before my predecessors it was contended that this opinion was not entitled to the force of a decision, among other reasons, because it was filed after the action had been dismissed. This contention is based upon an affidavit filed in the Department by C. C. Tripp, the party litigant, against whom the decision was made in said opinion. From the evidence of L. S. B. Sawyer, clerk of the circuit court in which the opinion was pronounced, and of Edw. J. Pringle and Alexander Campbell, counsel for the defendant, contradicting and refuting the statements in Tripp's affidavit, I cannot doubt the truth of the statement in the note appended to the opinion in 5th Sawyer, at page 216. That note is as follows:

"The decision in the above case was given orally, the presiding justice stating at length his views, and observing that he would at a sub-

sequent day file an opinion embodying their substance. A day was then fixed for counsel to prepare the findings, but soon afterwards the case was settled, and the suit dismissed by stipulation of parties."

The fact that this decision was orally given and subsequently written out and filed when the case was dismissed, in no respect, I think, affects its character as an exposition by a judge of the law. It is a practice common to all courts to deliver oral opinions and subsequently to write them out. The authoritative force of such an opinion, will of course, depend upon the circumstances of the case in which it is given, the deliberation attending it, the learning of the judge, the issue made by the record, and many other conditions entirely irrespective of the stage of the case or the time when the entry of judgment is made.

It seems, however that the action of the court in this case was not regarded at the General Land Office as *res adjudicata* in the matter of the correctness or incorrectness of the Stratton survey. For, some months after it was made (November 11, 1878,) the Commissioner of the General Land Office, J. A. Williamson, rendered his decision confirming the Stratton survey (2 C. L. L., 1234). From this decision, an appeal to the Secretary of the Interior in behalf of the city and in discharge of its trust to the lot-holders and for the benefit of its inhabitants, was taken by the attorney appointed to prosecute the case for the city as the trustee of the lands claimed. Whereupon the board of supervisors, who had previously indicated their purpose not to appeal from said decision of the Commissioner of the General Land Office, passed a resolution characterizing said action by said attorney as unauthorized and discharged him from his office.

A short time afterwards they unanimously passed a resolution addressed to the Secretary of the Interior, that, in the opinion of said Board, the Stratton survey was the only legal and proper definition of the boundaries of the city and should be finally confirmed by the Interior Department. Indeed the board of supervisors reversed the position taken in the original protest of the city against the Stratton survey when it was completed, and used their utmost endeavors, by resolutions and other acts, to have the same approved.

Secretary Schurz, however, held that neither these resolutions, nor any other acquiescence by the municipal authorities of the city, nor any assumption by the State of California of the correctness of said survey, could relieve him of his duty, under his supervisory or appellate authority, to see that the decree of the United States circuit court was properly executed by a survey in conformity with the boundaries prescribed therein.

On the 3d day of March, 1881, he filed his decision in the case, in which he substantially sustained the objections contained in the original protest of the city to the running of the boundary line up Mission Creek and then down it.

The opinion concludes as follows: "your decision upon the entire survey of the claim, confirmed by said decree and Acts of Congress, except as herein modified, is affirmed." The modification alluded to was his direction in conformity to the recommendation of Surveyor-General Day that the line of ordinary high-water mark of the bay should be followed, and not the banks of Mission and other creeks; but that said creeks should be crossed at their mouths in following the line of the bay. To this end he directed that a map, known as Eddy's Red Line Map, should be made the basis of said amended survey, which map the Secretary claimed had been established, sanctioned and recognized in the most solemn manner by the State laws and by the city for years, and contained the best available evidence of the line of ordinary high-water mark of 1846, around that portion of the city.

Soon after the conclusion of Mr. Schurz's term of office and Secretary Kirkwood's appointment as Secretary of the Interior, an application to the latter was made for a re-hearing, in support of which a report from the surveyor-general's office was brought to his attention referring to certain representations of Deputies Minto and Allardt setting forth that the red line on Eddy's map, as ordered by Mr. Schurz, could not be followed; that the said red line diverged widely from ordinary high-water mark, at one point extending two hundred feet out into the bay, at another running along the side and on the top of the bluff; and at still another at an elevation of sixty-eight feet above tide level; and that the marsh lands near the mouth of Mission creek were reached by the ordinary high tides and totally submerged, from one to eighteen inches, by about one hundred and twenty tides every year.

To this petition for a re-hearing, based on these reports from the surveyor-general's office, Secretary Kirkwood issued an order to the Commissioner of the General Land Office, in these words: "I desire the survey, *ordered by my predecessor, to be made at once*, according to the best judgment of the surveyor-general. When so made it will be a proper subject for consideration by your office and the Department. You will so instruct the surveyor-general immediately.

Mr. Teller, who had become Mr. Kirkwood's successor, was informed that the surveyor-general of California was not making the survey ordered by Mr. Schurz, but was disregarding that order under what he construed to be the discretion vested in him by the words "according to your best judgment." Thereupon Mr. Teller telegraphed the surveyor-general to suspend his operations. But, inasmuch as the survey and field notes had been returned to his office, he, notwithstanding Mr. Teller's order, platted and sent it forward to the Department with his approval. The survey thus made was substantially a repetition of the Stratton survey.

Another application was made by Messrs. Shellabarger and Wilson, attorneys for claimants under the Stratton survey, to Secretary Teller that the whole matter be re-heard and the survey made by Allardt and

Minto confirmed. This motion was orally argued before Secretary Teller on the 11th day of December, 1882, and on July 12, 1883 (2 L. D., 346)* he rendered his decision in which he substantially confirmed that of his predecessor and directed that "in running along the line of ordinary high-water mark of the bay, the main shore or coast line of such body of water, identified by its larger description, shall be followed, cutting across the mouths of streams, estuaries and creeks which, intersecting the body of the peninsula, find their entrance into said ocean or bay."

Instructions in accordance with this decision were issued by the Commissioner of the General Land Office to the United States surveyor-general of California, in obedience to which the deputy-surveyor, F. Von Licht, proceeded to make a survey of said lands, a map of which, with his report, was sent on to Washington. Said deputy-surveyor, however, in certifying that it was in accordance with instructions received, stated that it was his belief, based upon close inspection of the ground and investigations made, that the survey was not in accordance with the decree of the United States circuit court.

As a part of the history of this case it is proper to state that before action was taken in the Land Office on this survey, a mandamus was sued for, in the supreme court of the District of Columbia, on the relation of the city and county of San Francisco, to compel the Commissioner to issue the patent in accordance with the Stratton survey upon the ground that the original opinion of Land Commissioner Williamson, approving that survey, was final, and that no appeal lies to the Secretary of the Interior in the matter of surveys of private land claims. The court, after argument, denied the writ.

A resolution was also introduced in the 48th Congress for the purpose of interfering with the issue of any patent based upon any other than the Stratton survey. Upon this latter resolution the judiciary committee made a report holding that the Secretary of the Interior was the supervisory head of the Department; that the Commissioner of the Land Office was his subordinate; that no action of the latter is beyond the reach of appeal to the former; that the Secretary of the Interior had good reason for deciding that the boundary line of San Francisco must run along the bay and cross the mouths of the estuaries and creeks from headland to headland thereof; and that if the grantees of the State or others had superior rights to those of the city, they could assert them in the courts of the country without any legislative assistance, and therefore recommended that the resolution lie on the table.

Pending these proceedings in the court and in Congress, the Von Licht survey was approved by the Commissioner of the General Land Office, and on June 20, 1884, the patent of the United States in accordance therewith was issued to the city of San Francisco, signed by the President, recorded in the Department, forwarded to the mayor of San

* See also 2 L. D., 353.

Francisco, and accepted in behalf of the city and county. The city, now, by its attorneys, insists upon the correctness and legality of said patent and protests against its cancellation and the issue of any other patent.

The decisions of Secretaries Schurz and Teller, above referred to, were made after hearing extended argument by counsel, and after elaborate examination. Every important consideration bearing upon the subject which has been pressed upon me was fully presented to them. The correctness of the Stratton survey itself; the recognition of the Stratton survey by the supervisors of the city; their acquiescence in numerous acts of the State assuming the Stratton survey to be correct, and the consequent estoppel upon them to contest its correctness; the conclusiveness of the approval of the survey by the Commissioner of the General Land Office; the refusal of the supervisors of the city to order an appeal from his decision; the consequent invalidity of the action of the city attorney in making an appeal or attempting to make one; the want of any appellate authority whatever over the Commissioner of the General Land Office respecting matters of surveys of private land claims; the impossibility of complying with the directions given by Secretary Schurz and reiterated by Secretary Teller for the new surveys; were all argued before the two Secretaries above named and were disposed of by them in carefully prepared opinions.

I am now asked to treat this consideration and judgment of my predecessors, as well as the opinion pronounced by the judge of the circuit court of the United States, as recorded in the official reports of its decisions, as of no validity; to hold that my predecessors had no jurisdiction to review the act of the Commissioner; that the circuit court had no jurisdiction to render the decision it pronounced; and that the Commissioner of the General Land Office was the only officer clothed with lawful authority to determine the validity of the survey of the land confirmed to the city. In other words, I am called upon to disregard as null the action of my predecessors and to reopen the question as to the title of the city to the land covered by the patent issued to it.

It is to be observed that this application does not ask that I, as the supervising authority of this Department, should review and correct its previous action in a case undisposed of and still pending in the Department. The question presented is whether when a contest for title is once closed by the issue of a patent to a claimant, which is accepted by such claimant, the jurisdiction of the Secretary of the Interior over that title continues. In other words, when the Land Department, acting within the scope of its authority, issues a patent which is delivered to and accepted by the grantee, the Secretary of the Interior has the right to annul that patent and issue another and a different one in its stead.

In *Moore v. Robbins* (96 U. S., 530) the court said:

"While conceding for the present to the fullest extent that when there is a question of contested right between private parties to receive

from the United States a patent for any part of the public lands, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office. *Not only has it passed from the Land Office, but it has passed from the executive department of the government.*" The court goes on to say, "The offices of Register and Receiver and Commissioner are created mainly for the purpose of supervising the sales of the public lands and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the Secretary if taken in time, but if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can of his own volition recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or re-conveyance of the land as to individuals, and if the government is the party injured this is the proper course." Again the court says, the functions of the executive department "necessarily cease when the title has passed from the government, and the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance generally called a patent has been signed by the President and sealed and delivered to and accepted by the grantee. It is a matter of course that after this is done neither the Secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so the titles derived from the United States instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating and in many cases unreliable action of the Land Office. No man could buy of the grantee with safety because he could only convey subject to the right of the officers of the government to annul his title. If such a power exists when does it cease? There is no statute of limitations against the government and if this right to reconsider and annul a patent after it has once become perfect exists in the executive department it can be exercised at any time, however remote. It is needless to pursue the subject further, the existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded. The order of the Secretary of the Interior therefore in Moore's case was made without authority and is utterly void and he has a title perfect both at law and in equity."

The court here re-affirms the doctrine laid down in *Johnson v. Towseley* (13 Wallace, 72,) in the following language:

"The decision of the officers of the land department made within the scope of their authority on questions of this kind is, in general, conclusive everywhere, *except when reconsidered by way of appeal within that department*; and that as to the facts on which their decision is based, in the absence of fraud or mistake that decision is conclusive even in courts

of justice when the title afterwards comes in question; but that in this class of cases as in all others there exists in courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have by a mistake of the law given to one man the land which on the undisputed facts belonged to another, to give appropriate relief."

If, now, I should, as the Secretary of the Interior did in Moore's case, after the patent has been issued by the Land Office; signed by the President, sealed and delivered to and accepted by the City of San Francisco, order that patent to be recalled and another one issued, the supreme court would be bound to say under this decision that "The order of the Secretary was made without authority and is utterly void."

The supreme court expressly says that after this is done neither the Secretary nor any other executive officer can entertain an appeal. In *Steele v. The Smelting Company* (106 U. S., 450) the court says:

"We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject."

After reviewing these decisions the court uses the following language:

"So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government, to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. * * * It cannot be vacated or limited by the officers themselves. Their power over the land is ended when a patent is issued and placed on the records of the Department; this can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose."

From these and numerous other decisions that might be cited to the same effect, denying all authority whatever in the Interior Department to recall or cancel a patent once issued by its orders, I can come to no other conclusion than that if every allegation of those who make this application could be established, as to the circumstances under which the patent was issued, as to the unwise and erroneous action of Secretary Schurz and Secretary Teller, their errors of law in the case or mistake of facts; the formal defect in the proceedings for appeal made to Secretary Schurz; the only remedy is with the judiciary and not in any authority vested in the head of this Department over the subject.

The case of *Adams against Norris* (103 U. S., 591) is cited as being an authority for the power which I am here asked to exercise. That was a case where a patent was issued for a portion of the Mexican land grant confirmed by the circuit court. Subsequently, finding that the

patent did not cover all the land granted and confirmed, a new patent was issued for the whole,—the first in 1866 and the last in 1870.

The court say of these two patents: "If the conveyance of 1866 passed the title to the claimants of a part of the land recovered by their confirmed grant, there is no reason why an additional patent should not convey the remainder when the proper officer became satisfied that the first did not convey all that had been confirmed to them." It so happened in this case that, in addition to the land omitted in the first patent, the last patent purported to convey also what was already patented, and the question arose whether this patent covering the whole claim, as well that included in the first patent as that in the last, was on that account invalid. The court said not; "The deeds are not in conflict. If the power of the Land Office was exhausted by the first deed, *it was only so as to the land which it included*. The legal title to that alone could pass by that patent, and if the title to the land now in question remained in the government, the patent of 1870 was sufficient to convey it." The whole force of the decision lies in the fact that it does not subtract in any way whatever from the right conveyed to the grantee by the first patent, but simply covers land omitted from that patent which was included in the grant. Clearly there was no objection to the issue of a second patent *for the land omitted*. Indeed, it was the duty of the Department to do so. If three parcels should be confirmed to a claimant and a patent should be issued for only two of them a subsequent patent might be issued for the third one and ought to be. Whilst there might be an objection to issuing a new patent for the whole three, except as to the land not embraced in the original patent, no additional title would be transferred thereby. But that is a very different thing from any attempt to recall a title which has once been passed by a patent issued. If an individual intending to convey three lots should, by mistake, only describe two, he, of course, might make a separate conveyance of the third, or a new conveyance embracing all three, but he could not recall the title which he had originally given. The Land Office may make as many patents as may be necessary to convey all that has been granted and confirmed to a claimant, but that does not give it the right to recall a title that has once passed from it. A recall cannot be accomplished except through regular judicial proceedings.

The rule of the Department in reference to the opening of a matter by one Secretary which has been formally adjudicated and closed by his predecessor, is well settled. The almost uninterrupted current of authorities on this point sustains the general proposition that a Secretary has no power or authority to revise or reverse the final decree of his predecessor in a matter properly before him. 2 C. L. O., 83; (2 Opin. Atty. Genl. 9; Id., 464; 4 Opin., 431; 5 Opin., 29; Id., 123; 9 Opin., 101, 301, 387; 12 Opin., 358; 13 Opin., 35; Id., 226; Id., 457; 15 Peters 401; Sec'y's., Dec., Beaubien & Miranda case, July 28, 1871). That

there may be and are exceptional cases which justify a departure from the general rule is undoubtedly true. Among them is the case where the action of a previous Secretary was without jurisdiction and void; it is, of course, not then binding upon his successor.

It is claimed that the patent under consideration is null and void for the reason that Secretary Schurz had no authority to modify or reverse the action of Commissioner Williamson in approving the Stratton survey. My authority is no greater than his, and if he had no authority to reverse Commissioner Williamson's decision approving the Stratton survey *before* any patent was issued, I certainly have none to reverse Land Commissioner McFarland's decision approving the Von Licht survey, especially *after* the patent is issued. If Secretary Teller had no authority to direct the Commissioner to issue a patent on the Von Licht survey, I certainly have none to direct Commissioner Sparks to issue a patent on the Stratton survey.

In view of the earnestness with which it is insisted that the Secretary of the Interior has not the power to reverse the action of the Commissioner upon the survey of a private land claim pending before him, I deem it proper to pass upon the proposition for the purpose of putting it at rest; at least until it has received an authoritative determination superior to my own.

By various acts of Congress the powers of the Department are clearly defined.

These acts are, so far as it is necessary for me at present to consider them, embodied in the Revised Statutes. Title XI treats of the Department of the Interior, and makes the Secretary of the Interior the head thereof. The second Chapter (Section 441) declares that the Secretary is charged with the supervision of public business relating to many subjects, among which are enumerated "public lands, including mines". The third Chapter (Section 453) provides as follows: "The Commissioner of the General Land Office shall perform, under direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to the private claims of land, and the issuing of patents for all (grants) of land under the authority of the government". The position of the applicants against the authority of the Secretary to review the decision of the Commissioner of the General Land Office rests upon the ground that the action of the Commissioner in passing upon the correctness of surveys of private land claims is a *quasi* judicial proceeding and therefore not subject to review, as no appeal to the Secretary in such cases is specifically provided. Passing upon the correctness of surveys of private land claims made by subordinate officers necessarily involves the exercise of judgment and may properly be called a *quasi* judicial proceeding; but it is none the less a proceeding taken in the discharge of an executive duty of the Commissioner,

within the meaning of section 453, and as such is under the direction of the Secretary by the express terms of that section. It is also under the supervision of the Secretary by virtue of section 441, as a proceeding relating to the public lands, inasmuch as a government survey of a private claim is necessary to segregate the lands included within the grant from the public domain.

There seems to be some misapprehension as to the meaning of the term "executive duty". The executive duties of any one of the Departments are such as are required of its officers in the administration of the law upon the subjects under its jurisdiction. They are not the less executive duties because they require in their performance the examination of evidence and the exercise of judgment thereon. All executive duties which are anything beyond the performance of ministerial acts, involve the exercise of judgment, such as examination, decision and final judgment, but they are not judicial acts in the sense that they can only be the subject of review by judicial tribunals or upon a formal appeal to some higher judicial authority. There is hardly an act of any moment performed in an executive Department which would not, if such were the case, be taken from the supervision and control of its head.

The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary whether or not these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter.

The case of *Butterworth v. Hoe* (112 U. S. 50) does not at all conflict with this view. There the words: "supervision and direction" of the Secretary were not held to give jurisdiction to revise the action of the Commissioner of Patents in issuing a patent, for the reason that the law had provided an appeal from his decision in such cases to the supreme court of the District of Columbia. The provision for that mode of review necessarily operated as a limitation to what would otherwise have been the natural meaning of the term "supervision and direction". Said the court, after referring to the legislation on this subject: "Congress has thus provided four tribunals for hearing applications for patents, with three successive appeals, in which the Secretary of the Interior is not included, giving jurisdiction, in appeals from the Commissioner, to a judicial body, independent of the Department, as though he were the highest authority on the subject within it. And to say that, under the name of direction and superintendence, the Secretary may annul the decision of the supreme court of the District, sitting on appeal from the Commissioner, by directing the latter to disregard it, is to construe a statute so as to make one part repeal another, when it is evident both were intended to co-exist without conflict".

The language of the act of July 1, 1864, (13 Stat., 332) which provides for the issue of a patent after the approval of the survey by the Commissioner of the General Land Office, is to be read in connection with the Revised Statutes subsequently adopted, placing all the business relating to the survey of private claims under the direction and supervision of the Secretary.

The argument based on the change of the mere verbiage of the statute of 1849 to the words contained in the Revised Statutes, does not impress my mind. It applies with as much force to the Indian Bureau as to the Land Office. If admitted, the Secretary would be not only deprived, except in one or two instances, of any appellate power over all the Bureaus of the Department, but shorn of any power which renders his supervision and direction effectual. No case has been brought to my attention supporting a construction so directly against the practice of the Department, and which, if sustained, would work such a radical change in its organization. On the contrary, running through the decisions of the supreme court, as well after as before the adoption of the Revised Statutes, this appellate power is recognized and asserted as clear and undeniable. Such recognition and assertion is distinctly made in the cases already cited for another purpose. Among numerous cases that of *Lee v. Johnson*, (116 U. S., page 48,) decided in the October term of 1885, may be cited. In that case, one, Enos Johnson, entered the land in controversy under the homestead laws. On account of certain acts which one Lee contended amounted to an abandonment of the land, a contest was initiated between Johnson and Lee. The Commissioner decided in favor of Johnson and on appeal the decision was reversed by the Secretary of the Interior, and the entry ordered to be canceled. The case coming before the supreme court on appeal,

the court uses the following language: "So in the present case the Secretary of the Interior came to the conclusion, from the evidence returned by the register, that Johnson must be considered not as a *bona fide* homestead claimant acting in good faith, but as one seeking, by a seeming compliance with the forms of law, to obtain a tract of land for his son-in-law who had previously exhausted his homestead privileges, observing that the element of *good faith* is the essential foundation of all valid claims under the homestead law. Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public land."

Such being the nature and extent of the supervisory and directory authority of the Secretary, he had jurisdiction to revise the action of the Commissioner upon survey of the claim of the City of San Francisco, whenever his attention was called to it, whether in a formal way by appeal, or in any other manner. In point of fact, an appeal was regularly and formally taken from the decision of the Commissioner by the special attorney of the City. It is true that the supervisors, in whom the legislative power of the municipality lies, voted not to appeal from the decision, but the special attorney rightfully regarded the city as a trustee for the lot-holders, to whose benefit the confirmation inured. The concluding terms of that confirmation are: "This confirmation is in trust for the benefit of the lot holders under grants from the pueblo or City of San Francisco, or other competent authority, and as to any residue in trust for the use and benefit of the inhabitants of the City."

The appeal of the city attorney, or as it has been called, "notice of the appeal," is in these words:

"IN THE DEPARTMENT OF THE INTERIOR,
"General Land Office.

"The City of San Francisco and its successor, the City and County of San Francisco, *in discharge of its trust for the benefit of the lot-holders* under grants from the pueblo, town or city of San Francisco, or other competent authority, and *for the benefit of the inhabitants of the city*, created by the final decree of the circuit court of the United States,"
 "hereby appeals to the Honorable Secretary of the Interior from the decision of the Honorable Commissioner of the General Land Office," etc., approving the Stratton survey.

True, the supervisors passed a resolution characterizing the appeal as unauthorized, but they neither dismissed the appeal, nor did they withdraw their protest against the survey. On the contrary, they passed the following resolution: "Resolved, that the Secretary of the Interior, before whom the matter relating to the boundaries of the pueblo decision which relates to the presidio reservation of San Francisco, is now pending, be requested to take up and decide said case without further delay, and that the officials of this city and county be directed not to ask for further postponement of said cause on behalf of said city;" thus recognizing that the case was pending before the Secretary.

Independently, however, of the regularity of the appeal, I believe Secretary Schurz and Secretary Teller both, so long as the case was undisposed of, had jurisdiction to order a re-survey by virtue of their supervisory authority over the Commissioner of the General Land Office in the matter of surveys of private land claims. The law places the Secretary at the head of the Land Department and makes it his duty to see that the laws of Congress respecting private land claims are carried out, and if knowledge comes to him in any way that the Commissioner has approved of any survey which is not authorized by law, he has authority, whether an appeal be taken or not, to review the action of the Commissioner, and to overrule it if it be erroneous. He cannot allow the government to be despoiled through what he deems to be a mistake in fact, or error in law, or any remissness on the part of any subordinate under him. I concur in the opinion of Secretary Schurz that the act of Congress required the survey to follow the decree, and that the city could not, by any act of its own, either by a formal declaration, or in any other way, change the duty of the officers of the Interior Department, or affect the rights of the United States, or of lot-holders claiming under the city. The city did not own the land. She was a trustee of it,—a trustee of the title for parties claiming under its conveyance, or occupying lots within its limits, and should not be allowed, being such trustee, to so control the case as to defeat the rights of the *cestui que trust*. When, therefore, the attorney took the appeal for the benefit of these *cestuis que trust* the municipal authorities of the city could not despoil them by repudiating the appeal.

But even assuming that I have full authority to do what this application asks, I feel it my duty to say that I concur fully with Secretary Schurz and Secretary Teller in holding that the Stratton survey was erroneous both as to law and fact; and also in deciding that the boundary line of the city of San Francisco as fixed in the decree of the circuit court must run along the bay and cross the mouths of Mission creek and other creeks from headland to headland. The law controlling such cases is well settled. What the surveyor had to do was to set off a tract of four square leagues on the extreme upper portion of the peninsula of San Francisco above high-water mark, as the same existed at the date of conquest, July 7, 1846, *bounded on the north and east by the Bay of San Francisco*, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the four square leagues. The only difficulty in making this survey seems to have been the "high water mark of the Bay of San Francisco, as it existed on the 7th of July, 1846," as the eastern boundary of the city.

Mr. Stratton in his report as quoted by counsel for the applicants, says:

"On account of the natural and artificial changes that have taken place in the water line of the city of San Francisco since its occupation by the Americans, in establishing the line of ordinary high tide from the point

San Jose Military Reservation to the mouth of Mission creek, I was compelled to rely entirely upon the first official map of said city, the map made by Wm. M. Eddy, the first city and county surveyor. A traced copy of the water line portion of said map, certified by the present city and county surveyor, Geo. C. Potter, on which the distances to the water line at the different angles, as measured on said map, are marked, and which was the basis of my calculations of the meander lines, will accompany these notes."

It is apparent from this extract, first, that it was impossible to survey this line in the open field; and, second, that this part of the survey, as reported by Stratton, was copied by him from a map, and not done in the open field. If the natural water line of the bay had been so effaced that it could not be found by actual inspection, it was his duty to seek for the evidence of its original position and so run the survey as to make its line coincide with the natural line called for in the grant. Now it is in evidence in this case that as early as 1852 a survey of the natural high water mark of this bay had already been made by officers of the United States government, charged with this duty by statute and by Executive order, for the purpose of establishing the coast line itself for all purposes relating to governmental administration. The following affidavit is on file among the papers in the case:

In the Department of the Interior. In the matter of the survey of the pueblo lands of San Francisco.

UNITED STATES OF AMERICA,

District of California, ss:

AUGUSTUS F. RODGERS, first being duly sworn, deposes and says, that since 1851, he has been stationed in California, (except eighteen months between 1867 and 1869) in charge of the United States Survey of the coast thereof, including the peninsula of San Francisco; that the traced chart or map, entitled "Map showing the line of ordinary high-water along the eastern side of the peninsula of San Francisco from Rincon Point to and including Islais Creek as surveyed by the Coast Survey of the United States, 1852" hereto annexed, was prepared from the published surveys of the Coast Survey of the United States and that the line laid down on that map in blue pencil, *from Rincon Point around Mission Bay to and including Islais Creek and crossing Mission and Islais Creeks, is a true delineation of the line of ordinary high water mark as it existed when he first knew it in the year 1852.*

And deponent further saith that, in determinining a boundary line stated as the line of "ordinary high water mark" on the bay of San Francisco, there can be no other course than to follow the stated line of ordinary high tide on the shore of the bay, *crossing the mouths of all inferior tidal streams or estuaries, many of which empty into San Francisco Bay at different points, and not to follow the meanders of any such inferior tidal streams or estuaries."*

* * * * *

AUG. F. RODGERS.

Subscribed and sworn to before me this 25th day of November, 1882.

[SEAL.]

L. S. B. SAWYER,

Com'r and Clerk of U. S. Circuit Court
9th Judicial Cir't Dist. Cal.

It thus appears that the survey of San Francisco Bay made by the officers of the Coast Survey, included the line of high water mark, the very line called for in this case as the eastern boundary of the city, and that the line established in this survey crossed Mission Creek, thus coinciding with the line indicated by Eddy's Red Line Map which Secretary Schurz directed as the basis of the amended survey ordered by him. The charts and records of this survey, made under the most thorough and scientific methods, were on file in the office of the Coast Survey of San Francisco, standing on the very tract of land the boundaries of which it was Stratton's duty to define. It is by no means unusual for United States authorities and state authorities, and for individuals having property interests along our coast lines to appeal to the records of the Coast Survey for data to identify and establish such original landmarks and boundary lines along the coast, which the hands of men in the course of settlement and industrial development have effaced. Since this case came before me a controversy between the authorities of the State of Delaware and those of the State of New Jersey respecting the division line between Delaware river and Delaware bay has been submitted to the officers of the Coast Survey and the line designated by these officers has been adopted by the authorities of these two sovereign states.

In view of the high scientific character of this bureau, and of the fact that it is charged by the government with this duty, Mr. Teller addressed an inquiry as to the rules governing that bureau in the survey of public waters. The following is the answer of the Superintendent to that inquiry :

U. S. COAST AND GEODETIC SURVEY OFFICE,
Washington, June 8, 1883.

Hon. HENRY M. TELLER,
Secretary of the Interior, Washington, D. C. :

SIR : In further illustration of the statement made by this office under date of June 5th, in answer to your letter dated May 31, 1883, concerning the practice of this office in defining the inner boundaries or outlines of bays when the same are interrupted by the mouths of estuaries, rivers or creeks, I submit the following additional statement:

This office has long since had occasion to adopt definite rules in that respect for the purpose of making estimates for projected work and giving account of work done.

The rule adopted is to draw the line between high water mark of the nearest points of land on each side of the interruption, in continuation of the general outline.

Thus, making use of familiar illustrations on the Atlantic coast, the "general coast line" is measured from Point Judith to Montauk Point; from Coney Island to Sandy Hook; from Cape May to Cape Henlopen; from Cape Charles to Cape Henry. On the Pacific coast, from Point Lobos to Point Bonita (San Francisco entrance), etc.

Descending to smaller features: in Long Island sound, the limits of the sound are defined by measuring across the mouth of the Thames river from high water at Eastern Point to Quinipeag Rocks; across the mouth of the Connecticut river, from high water mark at Griswold's

Point (Lyne) to Lynde's Point (Saybrook); in Delaware bay, across Mahon's river between the opposite points of marshes. By the same rule we define the limits of Mission bay, near San Francisco, by drawing the line across Mission creek over the projecting points of marsh on each side.

It appears needless to multiply illustrations, and I trust that I have succeeded in setting forth the rule and practice of this office.

Very respectfully yours,

J. E. HILGARD,
Superintendent.

Mr. Teller adds the following just observations:

"From the foregoing it will be seen that although no suggestion was made to him as to localities, the inquiry being in the most general terms, the Superintendent has instanced this very case as illustrative of the accepted rule. It can hardly be claimed, therefore, that a call for San Francisco bay, being a larger description than Mission bay, will demand the inclusion of an estuary of the latter, which by the ordinary rules of boundary has been excluded from other designation than that of a mere creek flowing into the lesser bay, but actually considered as forming no portion of such bay designated as a distinctive body of water.

Again: Here the boundary is not the stream, but the bay; consequently the 'ordinary high water mark' must be the high water mark of the shore as pertaining to the sea, and not the high water mark of the bank as pertaining to a river or stream. So that, although Mission creek is alleged to have been as well a tidal inflow as an outlet for the inland waters, it nevertheless falls within banks instead of resting upon shores, and must be considered an inland water for all purposes; being far within the rule laid down in *United States v. Grush*, (5 Mason, 209,) and clearly covered by the late case of *United States v. Steam Vessels*, (No. 141, October term, 1882).

This last case cited by the Secretary is reported in 106 United States Reports, at page 607, under the name of *Porter v. United States*. One of the questions was, is James River an inland water, so that property captured upon it is subject to the act of Congress of March 12, 1863. The court says:

"James River is an inland water in any sense which can be given to the term 'inland.' It lies within the body of counties in Virginia. For miles below Richmond, and below the obstruction mentioned, a person can see from one of its banks what is done on the other. Rivers across which one can thus see are inland waters. It matters not that the tide may ebb and flow for miles above their mouths; that fact does not make them any part of the sea or bay into which they may flow, though they may be arms of both."

Holding these views I am of the opinion that the re-survey by Von Licht on which the patent was issued to the city of San Francisco was properly ordered. It is said that even if the Land Office had properly ordered a re-survey, such re-survey was not made as the law requires. In other words, that the survey made by Von Licht, upon which the patent was issued, was not filed and retained in the surveyor-general's office and notice published so that parties interested therein

might interpose objections thereto. In order that these objections may be fairly weighed I give the section of the law on which it is based in full:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That whenever the surveyor-general of California, shall in compliance with the thirteenth section of an act entitled 'An act to ascertain and settle the private land claims in the State of California,' approved March 3, eighteen hundred and fifty-one, have caused any private land claim to be surveyed and a plat to be made thereof, he shall give notice that the same has been done by a publication, once a week for four consecutive weeks, in two newspapers, one published in the city of San Francisco, and one published near the land surveyed; and shall retain in his office, for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco shall have expired; and if no objections are made to said survey, he shall approve the same, and transmit a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval; but if objections are made to said survey within the said ninety days by any party claiming to have an interest in the tract embraced by the survey, or in any part thereof, such objections shall be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the surveyor-general, together with such affidavits or other proofs as he may produce in support of the objections. At the expiration of said ninety days the surveyor-general shall transmit to the Commissioner of the General Land Office at Washington, a copy of the survey and plat, and objections, and proofs filed with him in support of the objections, and also of any proofs produced by the claimant and filed with him in support of the survey, together with his opinion thereon; and if the survey and plat are approved by the said Commissioner he shall endorse thereon a certificate of his approval. If disapproved by him, or if, in his opinion, the ends of justice would be subserved thereby, he may require a further report from the surveyor-general of California, touching the matters indicated by him, or proofs to be taken thereon, or may direct a new survey and plat to be made. Whenever the objections are disposed of, or the survey and plat are corrected, or a new survey and plat are made in conformity with his directions, he shall indorse upon the survey and plat adopted his certificate of approval. After the survey and plat have been, as hereinbefore provided, approved by the Commissioner of the General Land Office, it shall be the duty of the said Commissioner to cause a patent to issue to the claimant as soon as practicable after such approval." (13 Stat., 332.)

The object of the publication of the notice when the original survey is made is to call attention to it of all parties who may be interested, not only the parties whose land is covered by the survey but parties having adjoining property which may be affected by it. The careful reading of this section shows that the proceedings therein set forth apply to the original survey. When the original survey is corrected, and a new survey made in accordance with the correction ordered, the law does not require the same proceedings to be gone through as with the original survey. The language of the statute is too plain for cavil: "whenever a new survey and plat are made in conformity with

his directions he shall endorse upon the survey and plat adopted, his certificate of approval." There is no publication of notice required. The law is complied with when the new survey is made in conformity with the directions.

This is in harmony with the practice and decisions of this Department. In 1879 Mr. Schurz held that the law contemplates the publication of but one survey, and that any subsequent survey of the same claim is not required to be published. In giving his directions to the Commissioner on this subject he says:

"During the time limited to such publication all objections to the survey will be presented. If upon the consideration of such objections and the testimony filed in support of them a new survey is ordered, either by your office or by this Department, the order directing the new survey should point out specifically in what respect the first survey is incorrect, and how the new survey should be made. When a survey is made in accordance with such directions and returned to your office for approval, the only question to be considered is *whether the decision directing the survey has been complied with*. If it has, then the survey should be approved; if it has not, then it should be returned for correction, and when corrected, approved. The law contemplates that objections may be raised to the first survey made, and hence gives an opportunity during the period of publication of ninety days thereafter, to any person affected thereby, to appear and object to the survey; but after the survey is corrected in accordance with your decision, no further publication is provided for, but the law directs that the plat of survey shall be approved by you and thereupon a patent shall issue to the claimant as soon as practicable after such approval."

This was in full accord with a decision made by the Commissioner of the General Land Office in 1875, in the *Rancho Corral de Tierra* case. Speaking of the act in question, Commissioner Burdett says:

"Here, it will be observed, is no express or implied authority for the publication of a resurvey of a private land claim in California, made after contest, under a decision of this office or of the Honorable Secretary; and there being no other provisions of law authorizing such a publication, it follows that none can legally be made by your office in such cases; for your office is one of limited jurisdiction, with only the powers conferred by legislative enactment, which cannot legally be exceeded, however disastrous the result.

In view of the law and for the reasons above set forth, you are hereby directed not to publish, under the provisions of the act of July 1, 1864, any resurvey of a private land claim in California made under a decision of this office, or of the Honorable Secretary of the Interior, where the publication of a prior survey of the same claim has once been properly made under said act, and the survey thus published, rejected by this office." (2 C. L. L., 1196).

There are other points in support of this application which I do not deem it necessary to dwell upon farther than to say that, in my opinion, they do not furnish any ground for recalling the patent and issuing another in its stead based upon an erroneous original survey.

It is to be observed that a patent of the United States upon a private land claim in California is made conclusive between the United States and the claimant only, and does not affect the interests of third persons. Such is the express language of the law. As was well observed in the report of the judiciary committee of the House, above referred to, if the applicants or parties claiming under them have rights superior to those of the city, they can assert them in the courts. If the patent is void, as applicants contend, it will be so pronounced by the courts.

In conclusion, I am of the opinion that there is no power in the Department to recall the patent issued to the city of San Francisco; that my order to that effect would be illegal and void; and that the matters presented for my consideration in the past proceedings of the case, do not justify any recommendation to the legal department of the government to institute proceedings to recall or modify or in any manner to interfere with said patent.

Application dismissed.

FINAL PROOF—PUBLICATION OF NOTICE.

DAVID B. WELLMAN.

The requirement that publication of notice shall be made in the paper nearest the land described in the application, is in accordance with the manifest purpose of the law, and must be observed in the submission of final proof.

Acting Secretary Muldrow to Commissioner Sparks, February 5, 1887.

I am in receipt of your letter of November 30, 1885, transmitting the appeal of David B. Wellman from your office decision of August 4, 1885, demanding that he make new proof in the matter of his commutation entry for the SE. $\frac{1}{4}$ of Sec. 35, T. 150, R. 66, Devil's Lake district, Dakota.

The ground upon which Wellman's proof was suspended and new proof demanded, was that notice of proof was published in the "Devil's Lake Inter-Ocean," more than forty miles from the tract. Upon being called on to show cause why his proof should not be suspended, Wellman made affidavit, duly corroborated by two witnesses, as follows:

That at the time deponent filed notice of his intention to make final proof in the Devil's Lake land office it was his desire that it be published in the "New Rockford Transcript," a paper published nearest the land; but the register ordered its publication to be made in the "Devil's Lake Inter-Ocean," against the wishes of this deponent; and deponent was informed and did believe that the designation of the paper was a matter entirely in the discretion of the register.

This affidavit the register transmitted to your office without comment; but when your office directed the local office "To advise Wellman that he will be allowed to make new proof within sixty days after notice, at the expense of the register of the Devil's Lake land office," the

register hastened to explain that he had forwarded Wellman's affidavit without having seen it, and added, "Mr. Wellman's allegation is unqualifiedly false if understood to mean that he expressed any such desire to the register. He never spoke to the register on the subject, nor did the register to his knowledge ever see the man."

Wellman appeals from your said office decision, alleging that—

Even though the register should pay for publication of new notice, this appellant would be obliged to encounter the expense of writing the proof, and a trip to Devil's Lake land office, about forty miles distant, of taking with him two of his neighbors as witnesses, of paying such witnesses for their time expended in so doing, and their expenses, and sundry other expenses necessarily incident to such trip.

The instructions, approved by the Department, and having the force of law, which have repeatedly been issued, directing that the time and place of giving homestead or pre-emption proof shall be printed in the newspaper "published nearest the land described in the application" (see circular instructions of March 1, 1884, pp. 14 and 8, as modified by circular instructions of July 31, 1884, 3 L. D., 52,) are in accordance with and pursuance of the manifest purpose of the law, that such notice shall be circulated in the community residing in the vicinity of the tract, in order that adverse claimants or other parties desiring to assert their own claims or object to the entryman's proof may be afforded an opportunity to do so. In the present case, notice given in a paper forty miles away, in another county, with a lake and an Indian reservation lying between, is practically equivalent to no notice at all to persons in the vicinity of the tract, who would naturally watch the columns of their own county paper for notice of final proof. I therefore affirm your decision in so far as it demands a new publication of notice of final proof. In order to save the entryman unnecessary expense, however, if on the day set for making such proof no protest or objection is filed, the proof formerly submitted may be accepted as final proof—*provided* that the claimant shall make affidavit, duly corroborated, showing continued compliance with the law from the date of making former proof.

Your office decision is modified accordingly.

PRACTICE—APPEAL; ACTING COMMISSIONER.

JOHN M. WALKER ET AL.

A decision made by the Acting Commissioner of the General Land Office, must be treated as if made by the Commissioner himself, for the law provides that the Assistant Commissioner shall act as Commissioner in the absence of that officer. The General Land Office has no jurisdiction over a case after appeal therein.

Acting Secretary Muldrow to Commissioner Sparks, March 17, 1887.

On November 18, 1886, Attorneys A. G. Heylman, Van H. Manning and S. F. Marshall filed an application to have certified to this Depart-

ment the proceedings in the cases of John M. Walker, C. M. Blair, D. C. W. Brashears, A. W. Harrison, Moses Roley, James R. Blades, Thomas O. George, W. D. Reynolds, E. S. Whittenberg, William Bohannan, John Pendleton, Leland Betterton, Caleb Sill, John F. Parrish and Edward Rush, applicants for certification of additional homestead rights.

It appears that by letter of August 12, 1886, you passed upon the separate application of John M. Walker, and held that in his case you had "no right to make the certification requested"; that on August 20, 1886, the Assistant Commissioner as Acting Commissioner took up the remaining cases above mentioned—C. M. Blair *et al.*—and decided that as said cases "are similar to the Walker case, they can not be certified to for the reasons mentioned in said decision." On August 21, 1886, a joint appeal in all of said cases was filed. On September 24th ensuing you addressed the following letter to the attorneys representing said claimants:

My attention has been called to office letter of 20th ultimo, refusing to certify to additional homestead rights in the following cases, viz: C. M. Blair, D. C. W. Brashears, A. W. Harrison, Moses Roley, James R. Blades, Thomas O. George, W. D. Reynolds, E. S. Whittenberg, William Bohannan, John Pendleton, Leland Betterton, Caleb Sill, John F. Parrish and Edward Rush. You are advised that I have not considered, nor was it it my intention to have acted upon any of the above until after decision by the Hon. Secretary of the Interior in the case of John M. Walker, decided by me August 12, 1886. The letter of the 20th ultimo was therefore inadvertently signed. It also embraced a number of cases which should have been acted upon separately. For those reasons the action taken by said letter of August 20, 1886, is hereby reconsidered and revoked. Your appeal of 21st ultimo is returned for amendment accordingly. The usual time for this purpose will be allowed.

Respectfully,

WM. A. J. SPARKS,
Commissioner.

From the tenor of this letter, I gather that it was the intention of the Commissioner to withhold decision in the cases of C. M. Blair *et al.*, until the Walker case had been decided by this Department, but that in his absence the Acting Commissioner took up said cases and decided them in accordance with the principles laid down in the Walker case. It appears that the decision of the Acting Commissioner was properly and carefully considered by him. The decision itself bears evidence that the cases involved were carefully examined, for it states that they are similar to the Walker case, and governed by it. Respecting this similarity to the Walker case, his opinion and yours seem to be the same, inasmuch as you held them subject to the determination of the latter case. The decision made by the Acting Commissioner must be treated as if made by the Commissioner himself. For the law provides that the Assistant Commissioner "shall act as Commissioner in the absence of that officer," (23 Stat., 136). Had it been claimed that the Acting

Commissioner signed the decision by mistake and unintentionally, a different question would be presented.

The facts were set forth in my letter of January 20th last, and it was therein held that "no such state of facts is presented as to take the case out of the ordinary rule that an appeal removes a case from the jurisdiction of the lower tribunal," and you were directed to transmit the papers in said cases to this Department. Afterwards, on the 22d of said month, said letter, on verbal request of the Commissioner, was recalled for further consideration.

Upon re-examination of the case, I find no reason for disturbing the former order. The case turns altogether on the question, whether your office can disturb its own decision after appeal therefrom is filed. This question was first presented to the Department in the case of McGovern v. Bartels (3 C. L. O., 70), wherein your office, after having rendered its decision, on the *ex parte* statement of Bartels made after appeal, reopened the case and reversed its own decision. The matter was presented to this Department by counsel for McGovern, and it was held that the point was well taken, "for after appeal the case was beyond your jurisdiction."

In the case of King v. Leitensdorfer (3 L. D., 110), an inspection of the record of the facts upon which that case was decided shows that the rule adopted in the McGovern-Bartels case was not only not departed from, but adhered to. Your office, on June 27, 1883, had rendered a decision adverse to King, and she had filed appeal therefrom. A motion to dismiss the appeal was filed by Leitensdorfer, on the grounds:

- 1st. That the decision of June 27 was merely interlocutory, and
- 2d. That the appeal was not filed in time.

Your office dismissed the motion, and the case came up on appeal. The Acting Secretary on September 15, 1884, held:

I concur with you that your decision of June 27, 1883, was a final determination of the matter as presented by the application of Mrs. King, and that an appeal therefrom by her to this Department was properly taken. The motion to dismiss, however, should have been made to this Department, and not to your office. The appeal was filed in time, reckoning from the date of notice to the attorneys residing in Colorado, and when said appeal was accepted by you, your jurisdiction over the matter ended: (McGovern v. Bartels, 3 C. L. O., 70).

The reference to the McGovern-Bartels case, without other comment, shows that the rule therein laid down was enforced, and not changed. The expression, "when said appeal was accepted by you, your jurisdiction over the matter ceased," refers merely to the jurisdiction of your office over the *appeal* (not the *case*), under the then existing rule of practice. For rule 82, of rules of practice approved December 28, 1882, then provided:

When the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from

the date of the service of such notice, the appeal will be dismissed and the case closed.

That rule was amended in the new rules of practice, approved August 13, 1885, so as to read as follows:

When the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice, the appeal may be dismissed *by the Secretary of the Interior*, and the case closed.

The power of the Commissioner to dismiss an appeal for "defect" was thus taken away. But even under the old rule 82 that officer had no right to review and revoke his decision on the case after appeal, but simply to dismiss the appeal, on failure of appellant to amend.

At the date of the McGovern-Bartels decision, July 19, 1876, no rule touching this question existed. At the date of the decision in the case at bar, the new rule was in force, and the power to dismiss an appeal for "defect" was lodged in *the Secretary*.

In this discussion, cases in which the Commissioner "shall decide that a party has no right of appeal" are not contemplated, for they are specially provided for in rules 83, 84 and 85.

It is not urged in this case that the appeal should have been rejected for "defect," or that it was not filed in time, that the parties have no standing as appellants, or that the case is not appealable. Had any of these propositions been urged as a basis for rejecting the appeal, a very different case would be presented for the Secretary.

But I find in the case of *Ward v. Dixon et al.*, decided by you December 18, 1886, and now on appeal before this Department, that you have followed the rule laid down in *McGovern v. Bartels*. In the *Ward-Dixon* case one Gray filed a motion for review of the said decision of your office, and you denied the same, on the ground that your jurisdiction over the case had ceased upon the filing of an appeal by Ward.

In this case you characterized the application for transmission of the record to the Secretary as an *appeal* in the following language: "*Your appeal of 21st ultimo is returned for amendment accordingly.*"

Finally, I can see no good reason for departing from the rule that an appeal places a case beyond your jurisdiction. It has been followed for many years in the practice of this Department, and is in my opinion in conformity with the practice of courts. I am therefore of opinion that the action of your office in revoking said decision of August 20 was without authority of law. To hold otherwise would give the Commissioner unchecked power to make adverse decisions affecting the rights of parties, and then by revocation deprive them of the right of appeal. It would also go far to obstruct the Secretary in the exercise of his supervisory authority.

You will accordingly transmit to this Department all the papers in said cases, in order that such action may be had as may seem right and proper in the premises.

ATTORNEYS BEFORE THE LOCAL OFFICES.

CIRCULAR.

Commissioner Sparks to registers and receivers, March 19, 1887.

From and after the 15th day of April, 1887, you will not recognize any attorney or agent for claimants or other parties to any proceedings before you until he has complied with the following regulations:

1. An attorney-at-law who desires to represent claimants or contestants before your office shall file a certificate, under the seal of a United States, State, or territorial court for the judicial district in which he resides or the local land office is situated, that he is an attorney in good standing.

2. Any person (not an attorney-at-law) who desires to appear as an agent for claimants or contestants before your office must file a certificate from a judge of a United States court or of a State or territorial court having common law jurisdiction, except probate courts, in the county wherein he resides or the local office is situated, duly authenticated under the seal of the court, that such person is of good moral character and in good repute, possessed of the necessary qualifications to enable him to render clients valuable service, and otherwise competent to advise and assist them in the presentation of their claims or contests.

3. The oath of allegiance required by Section 3478 of the United States Revised Statutes must also be filed by applicants. In case of a firm, the names of the individuals composing the firm must be given, and a certificate and oath as to each member of the firm will be required.

4. An applicant to practice under the above regulations must address a letter to the register and receiver, inclosing the certificate and oath above required, in which letter his full name and post-office address must be given. He must state whether or not he has ever been recognized as an attorney or agent before this Department, or any bureau thereof, or any of the local land offices, and if so, whether he has ever been suspended or disbarred from practice. He must also state whether he holds any office under the government of the United States.

After an application to practice has been filed in due form, the register and receiver will recognize the applicant as an attorney or agent, as the case may be, unless they have good reason to believe that the person making the application is unfit to practice before their offices, or unless otherwise instructed by the Commissioner or Secretary.

Registers and receivers must keep a record of the names and residences of all attorneys and agents recognized as entitled to represent clients in their several offices.

Every attorney must, either at the time of entering his appearance for a claimant or contestant or within thirty days thereafter, file the

written authority for such appearance, signed by said claimant or contestant, and setting forth his or her present residence, occupation, and post-office address. Upon a failure to file such written authority within the time limited, it shall be the duty of the register and receiver to no longer recognize him as attorney in the case.

An attorney in fact will be required to file a power of attorney of his principal, duly executed, specifying the power granted and stating the party's present residence, occupation, and post-office address.

When the appearance is for a person other than a claimant or contestant of record the attorney or agent will be required to state the name of the person for whom he appears, his post-office address, the character and extent of his interest in the matter involved, and when and from what source it was acquired. Authorizations and powers signed or executed in blank will not be recognized.

If any attorney or agent shall knowingly commit any of the following acts, viz: Represent fictitious or fraudulent entrymen; prosecute collusive contests; speculate in relinquishments of entries; assist in procuring illegal or fraudulent entries or filings; represent himself as the attorney or agent of entrymen when he is only attorney or agent for a transferee or mortgagee; conceal the name or interest of his client; give pernicious advice to parties seeking to obtain title to public lands; attempt to prevent a qualified person from settling upon, entering, or filing for a tract of public land properly subject to such entry or filing, or be otherwise guilty of dishonest or unprofessional conduct; or who, in connection with business pending in local land offices or in this Department, shall knowingly employ as sub-agent, clerk, or correspondent a person who has been guilty of any one of these acts, or who has been prohibited from practicing before the register and receiver or this Department, it will be sufficient reason for his disbarment from practice, and you are authorized to refuse to further recognize any person as agent or attorney who shall be known to you or be proven before you to be guilty of improper and unprofessional conduct as above stated.

An attorney or agent who has been admitted to practice in any particular land district may be enrolled and authorized to practice in any other district upon filing with the register and receiver of such district a certificate of the register or receiver before whom he was admitted to practice that he is an attorney or agent in good standing.

Any unprofessional conduct on the part of an attorney or agent should be reported to the Commissioner at once, together with your action in the premises.

Appeals from the action of the register and receiver in refusing to admit to practice or in refusing to further recognize an agent or attorney will lie to the Commissioner and Secretary, as in other appealable cases

Approved:

L. Q. C. LAMAR,

Secretary.

*MINING CLAIM—NOTICE BY PUBLICATION AND POSTING.***GREAT WESTERN LODE CLAIM.**

When notice is required to be given by different forms and modes to cover the same period, notice by either of the different modes will not run against an adverse claimant until given by each mode and form required.

Though proper publication may not be secured within less than sixty-three days, the posting in the local office is sufficient if it covers sixty days of that period.

If notice is posted in the local office the first day of publication, an adverse claim should be filed within sixty days from that date, but if such notice is not posted until three days thereafter, an adverse claim may be filed on the last day of publication.

Acting Secretary Muldrow to Commissioner Sparks, March 21, 1887.

I am in receipt of your letter of February 26, 1887, transmitting the record in the case of the Bodie, California, mineral entry No. 177, made December 1, 1883, by Henry Williams, for the Great Western lode claim. This entry is submitted for my consideration and action under sections 2450 and 2457 of the Revised Statutes, as amended by act of February 27, 1877. I am of the opinion that the entryman has complied with the law as to publication and posting of notice, and that this case need not be sent to the Board of Equitable Adjudication.

The posting of notice on the claim was made August 9, the publication of notice first appeared August 14, and the posting in the local office was made August 16. It appears, however, that the three forms of notice continued to run from August 16 to October 16, a period of sixty-one days from the date of posting in the local office. You declined to approve this entry for patent, owing to this irregularity, holding that the posting in the local office did not cover the entire period of publication, upon the theory that if the publication is for a greater period than sixty days, the posting in the local office must cover the entire period of publication, although an identical period of sixty days may have been covered by the publication and the posting of notice in the local office.

When notice is required to be given by different forms and modes to cover the same continuous period of time, notice by either of the different modes will not run against an adverse claimant until notice has been given by each and every mode and form required. Hence, as in this case, an adverse claimant does not take notice by publication until notice is posted in the local office as required by law, although the publication may have commenced prior to the filing of notice in the local office. The sixty days within which adverse claims may be filed will be computed from the time when notice has been given by all the modes required.

In the case of *Miner v. Marriott* (2 L. D., 709), the Department held that while notice by publication—when it is given in a weekly paper—must from the necessity of the case cover a period of sixty-three days, yet an adverse claim must be filed within sixty days, and can not be

filed on the last day of publication, if that day exceeds the period of sixty days. But, as the law only requires that notice by publication and posting shall be for a period of sixty days—if from the necessity of the case the publication will be required to run for a period of sixty-three days—it does not follow that notice must be posted in the local office for that entire period, but only for sixty days of that period.

If the notice is posted in the local office the first day of publication, an adverse claim should be filed within sixty days from that date, but if the notice is not posted in the local office until three days thereafter, an adverse claim may be filed on the last day of publication.

This view is not in conflict with the rule laid down in *Miner v. Marriott*, and is a compliance with the provisions of the statute and the rules and regulations thereunder.

RAILROAD GRANT; TIMBER TRESPASS.

CHICAGO, ST. PAUL, M. & O. RY. CO.

It appearing that the title to the lands in question will pass under the selections made thereof, action against the company for trespass thereon is not advised.

Secretary Lamar to Commissioner Sparks, March 22, 1887.

By letters of March 10, 22, 29, and September 10, 1886, you transmitted a number of documents, relating to alleged timber trespasses by the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and their agents, sub-contractors and vendees, upon certain lands in Wisconsin.

You state that said lands are claimed by the company "as falling within their indemnity limits, and are shown by the tract-books * * * * * to be mostly covered by selections made by said railroad company and the Farm Mortgage Company, as well as by the State;" and further you say that "none of these selections have been approved." Thereupon, you recommend that the "Attorney General be requested to cause the said companies, their officers and agents, to be restrained from cutting or disposing of timber upon any lands selected or claimed as indemnity lands, or being within withdrawn indemnity limits, the legal title to which has not been conveyed to them by the United States;" that civil suits be instituted against the companies to recover the value of the timber cut, and that their officers, agents and sub-contractors, etc., be proceeded against criminally.

On April 22, 1886, you were requested to furnish a list of the selections made by the companies and "the reasons, if any exist, why said selections have not been acted upon, and rejected or approved."

On June 3, 1886, you transmitted list of selections, as requested, and stated that the—

Selections by the North Wisconsin Railroad Company, and by its successor, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, have not been approved, because of the failure of said com-

pany to construct its line within the time required by the granting acts, and of pending legislation looking to a forfeiture of the grant, and have not been rejected, because of the decision of the supreme court of the United States in *Schulenberg v. Harriman* (21 Wall., 44), wherein it was held that the lands granted to the State for said company have not reverted to the United States, although the road was not constructed within the period prescribed, no action having been taken either by legislation or judicial proceedings to enforce a forfeiture of the grant.

The selections made for the benefit of the Farm Mortgage Company were rejected by you, and your action in that respect was reversed by departmental decision of August 20, 1886 (5 L. D., 80); and the selections made for that company having since been approved by me, all questions relating to the lands embraced therein must be eliminated from the matter now under consideration.

Briefly told, the history of the grant under which the Chicago, St. Paul, Minneapolis and Omaha Railway Company claims the lands alleged to have been trespassed upon is as follows:

On June 3, 1856 (11 Stat., 10), to aid in the construction of a railroad from Madison or Columbus *via* Portage to the St. Croix river, thence to the west end of Lake Superior and Bayfield, in Wisconsin, Congress granted to said State six alternate odd numbered sections of public land along each side of the line of said road, with right to select indemnity for lost lands within fifteen miles from the line of the road. Only a portion of the road south of the St. Croix river having been built under this grant, on May 5, 1864 (13 Stat., 66), Congress passed another act, whereby the continuity of road, as established in the first grant, was broken, and by the first section of the new act was granted to the State of Wisconsin, for the purpose of aiding in the construction of a road from the St. Croix river northward to the west end of Lake Superior and to Bayfield, ten odd numbered sections per mile on each side of the line of said road, and the indemnity limits were increased to twenty miles within which selections were to be made as in the act of 1856. The Chicago, St. Paul, Minneapolis and Omaha Railway Company is successor of the company upon which was conferred by the State the grant contained in the first section of the act of 1864. Only some forty miles of said road was built within the time limited by the State act, but the whole line was completed prior to and has been constantly engaged in traffic and transportation since 1883.

In the departmental decision in the case of the Wisconsin Railroad Farm Mortgage Company (5 L. D., 93), in passing upon the same grant now under consideration, it was said:

Inasmuch then as after the lapse of twelve years from the rendition of that decision (*Schulenberg v. Harriman, supra*), no forfeiture has been enforced by or under authority of Congress, the title of the State is unimpaired to the lands described in the grant, and *to indemnity within the limits withdrawn to make good the deficiency in place*. These rights thus conferred upon the State of Wisconsin and thus enforced by the decision of the supreme court constitute the measure of your

duty and mine with respect to these lands. What the statute confers, the statute means to be enjoyed. What the statute directs, it means to have done. Not to do it, or even delay unnecessarily the doing of it, is to violate the statute and involves a grave dereliction of duty.

The views thus expressed are strictly applicable to the matter now under consideration; and further reflection shows no cause for changing or modifying them in the least.

I therefore decline to concur in your recommendations to the Attorney General, but, on the contrary, I have to direct that you cause said railroad grant to be forthwith adjusted, and transmit for my approval, in the customary form, proper lists of lands subject to selection and selected by said company, within the indemnity limits of said grant.

MINING CLAIM—POSTING; BOARD OF EQUITABLE ADJUDICATION.

NEW YORK LODE & MILL-SITE CLAIM.

An entry, made on application covering a lode claim and contiguous mill-site, where the proof shows full compliance with the law, except in posting on the mill-site portion of the claim, may be confirmed by the Board of Equitable Adjudication, in the absence of an adverse claim, and where the informality was the result of an honest mistake.

The ruling in *John W. Bailey et al.* modified.

Acting Secretary Muldrow to Commissioner Sparks, March 23, 1887.

November 4, 1878, Hiram B. Everest made mineral entry No. 1091, embracing the New York Lode and Mill-Site Claim, situated in Grand Island mining district, Central City, Colorado. The tract embraced in the lode and mill-site portions of the claim respectively lie contiguous, and together contain about 7.09 acres. The proofs submitted when the entry was allowed by the local office show that the law had been complied with in all particulars, except that the plat and notice of application for patent had not been posted upon the mill-site portion of the claim as required by Section 2337 of the United States Revised Statutes, but only upon the lode portion thereof. Accordingly, after having made several ineffectual calls for said absent proof, your office, on March 3, 1885, issued patent for the lode portion of the claim, and by letter "N," dated October 2, 1885, held said entry for cancellation as to the mill-site portion thereof. From this decision an appeal has been filed, and the case is here for consideration.

It appears from the record that the failure to furnish the necessary proof in this case arose from no intention on the part of claimant to evade the law, but was an honest mistake for which the United States deputy surveyor and the local office were to a certain extent responsible; that claimant now owns two lode claims contiguous to this mill-site, and has expended considerable sums of money on each and can not successfully work them without this mill-site; that the lands embraced in said mill-site are of no practical value to any one except the owner of

said lodes; and that no adverse claim has ever been set up, and claimant has held sole and undisputed possession of said mill-site since his entry in 1878. He therefore asks that your said office decision be reversed and that patent issue for said mill-site.

In support of said appeal is cited the case of John W. Bailey *et al.*, and Grand View Mining and Smelting Company (3 L. D., 386), in which the facts and circumstances were similar to those in this case.

If said case is to be followed as a precedent, it would seem to rule this one and thus sustain the appeal. But I am of opinion that the conclusion in said case is not in harmony with section 2337 of the United States Revised Statutes. Said section requires that a copy of the plat and notice of application for patent must be conspicuously posted upon the mill-site as well as upon the vein or lode claim for the statutory period of sixty days. See also paragraph 73, U. S. Mining Laws and Regulations thereunder, October 31, 1881.

I think, however, that this is a case coming under section 2457 U. S. Revised Statutes. The law has been substantially complied with, the informality appears to have arisen from an honest mistake, and there is no adverse claim.

Entertaining these views, I reverse your said office decision, and return herewith the papers in the case, with directions that in case appellant by his counsel file within sixty days written application for submission of this case to the Board of Equitable Adjudication, the same be duly certified for the action of that tribunal.

The ruling in the case of Bailey *et al.* (*supra*) is modified in accordance with the views above expressed.

SWAMP LANDS—ADJUSTMENT OF GRANT.

STATE OF LOUISIANA.

Field notes of survey made after the passage of the swamp grants are presumed to designate properly the character of the lands described with reference to said grants. No such presumption attends the field notes of survey made before the passage of said acts.

On agreement to make the field notes of survey the basis of adjustment the State will only take such lands as are clearly shown by the notes to be of the character granted.

When the field notes of survey have been made since the passage of the act of 1849, and with reference thereto, they will be held to entitle the State *prima facie* to the lands returned as swamp and overflowed, without the additional words, "made unfit thereby for cultivation"; but where made before the passage of that act all the descriptive words in the grant, or words clearly of a like import, must appear; and where they do not so appear, the State must show by other satisfactory evidence that the lands claimed are of the class contemplated by the grant.

Secretary Lamar to Commissioner Sparks, March 25, 1887.

On November 21, 1885, (4 L. D., 524), your office refused the application of the State of Louisiana to have all lands listed to said State that

are described by the field notes as "low prairie, not arable," "not fit for cultivation," "bottom lands," "low ground," or "low wet lands," for the reason that the lands so described were not necessarily "swamp and overflowed lands made unfit thereby for cultivation."

Said decision of your office also states that, "The State made field selections at an early date of the swamp lands claimed under its grant. Recently, upon representation that there were still remaining unselected lands that were of the character granted, the application of the State to have the adjustment of the grant proceeded with and completed by an examination of the field notes of township surveys was acceded to," and that your office adopted the rule in making such adjustment that "where the field notes show the lands to be 'swamp and overflowed,' such tracts are to be listed to the State." From said decision an appeal was taken, and this Department on May 12, 1886, affirmed your office decision. Upon the application of the State's attorney, said departmental decision was recalled on July 9, 1886, to enable him to file argument in the cause.

The whole record has received careful consideration. In the appeal filed by the State, it is alleged that your office erred in stating that "the State made swamp land selections at an early day in Louisiana," that "recently, upon representations that there were still remaining unselected lands, the State applied to have the field notes made the basis for adjustment," and your office acceded to the request; that lands described as "low wet, bottom," etc., are not conclusively shown to be swamp or overflowed lands within the meaning of the swamp grant; and that the State and government must be bound by the field notes in adjusting said grant.

By the first section of the act of Congress approved March 2, 1849 (9 Stat., 352), there was granted to said State "the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation." The second section of said act provides that as soon as the Secretary of the Treasury shall be advised by the governor of said State that the State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made under the direction of the surveyor-general thereof, by experienced and faithful deputies of all the swamp lands therein which are *subject to overflow and* unfit for cultivation, and a list of the same to be made out, and certified by the deputies and surveyor-general to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana. Section three provides how the selection shall be made when only part of a subdivision is swamp land, and also exempts from the provisions of said act all lands fronting on rivers, creeks, bayous, water-courses, which have been surveyed into lots or tracts, under the acts of March 3, 1811 (2 Stat., 662) and May 24, 1824 (4 Stat., 34), and it further provides "that the

United States shall in no manner be held liable for any expense incurred in selecting these lands and making out the lists thereof, or for making any surveys that may be required to carry out the provisions of this act."

It appears that your office, on April 18, 1850 (Vol. 1, p. 46, General Land Office Record), with the approval of the Secretary of the Interior, issued to the surveyor-general of said State general instructions for his guidance in the execution of said act. Among other things, he was advised that "the true intent of the act requires that the selection of those lands should be made upon the most economical system possible. Hence, where the State is willing that that course should be adopted and the field notes designate the limits of swamp and overflow, those field notes may govern in determining the land to which the State is entitled under the law, but where lands have been represented by the field notes as overflowed or swamp lands, but which are now believed not to be of that character, they should be now examined in reference to those points before deciding whether or not they shall enure to the State under the act;" that the Secretary being authorized by said act to cause said examination to be made at the expense of the State, is willing that the governor should select the agents for that service, subject to the approval of the surveyor-general; and that, if the governor selects the persons to make the examinations and lists required by said act, the lists of lands falling to the State made by said agents must be certified by them to the surveyor-general, who, if satisfied of their correctness, will transmit the same to your office. Under said instructions, lists embracing many millions of acres were transmitted to your office, and these lists were absolutely confirmed to the State by act of Congress approved March 3, 1857 (11 Stat., 251, R. S., Sec. 2484), "so far as the same remained vacant and unappropriated and not interfered with by an actual settlement under any law of the United States." *Martin v. Marks* (97 U. S., 345).

The act of Congress approved September 28, 1850 (9 Stat., 519), granted to the State of Arkansas, and each of the other States of the Union, all of the "swamp and overflowed lands made unfit thereby for cultivation," which remained unsold at the date of the passage of the act. The second section of said last-named act provides that the Secretary of the Interior, as soon as practicable after the passage of said act, shall make out a list and plats of the lands granted, and when requested by the governor cause a patent to be issued for the lands so listed.

On November 21, 1850 (1st Lester, 543), instructions were issued to the proper land officers for the purpose of carrying into execution the provisions of the last named act, and they provided that if the authorities of the State were willing to adopt the field notes of survey as the basis for the list of lands granted, then they should be so regarded by said officers.

As early as December 23, 1851 (1 Lester, 549), this Department held that both of said acts were present grants, taking effect from the date of their passage, and that the act of 1849 applies to the State of Louisiana alone, providing a particular method of selection, while the act of 1850 applies to Arkansas and the other States, and made it the duty of the Secretary of the Interior to make out lists and plats of the granted lands at the expense of the United States.

On January 14, 1856, my predecessor, Secretary McClelland, held that the act of 1849 is not merged in the act of 1850, but that "each is to be executed according to its special tenor and provisions, the latter being merely cumulative and embracing land which was excepted from the former." (1 Lester, 554.) *as to manner of selection only; See 1 Lester*

It has been uniformly held by this Department and by the courts that said acts granted to the States referred to therein all of the land of the particular character described, to which the United States had title and not reserved at the date of said acts. 1 Lester, Nos. 578-595; 2 L. D., 652; 3 L. D., 474; 4 L. D., 415; 9 Opin., 254; Railroad Company v. Fremont County, 9 Wall., 89; French v. Fyan, 3 Otto, 169. *act appl. to*

In the case of the swamp land claim of the State of Oregon (7 C. L. O., 53), my predecessor, Secretary Schurz, on June 4, 1880, rendered a well considered decision construing the act of 1850, and re-affirming the former decisions declaring that said act was a present grant, vesting an immediate interest in the State; that the Secretary of the Interior is charged with the duty of making out the list and plats of the lands granted and he may adopt such method and employ the means for the performance of that duty that seems best in his judgment for the interests of the State and the government; that the State's selection has no binding effect upon the government, and the Secretary is not bound to list every tract claimed by the State. It was also held in said decision that while the States have been permitted to elect that they will adopt the field notes as the basis of their claim, there is no statutory requirement compelling them to do so, and if the Secretary fails to perform the plain duty required by said act, the title of the State is not affected thereby, citing Railroad Company v. Smith (9 Wall., 95).

It is quite clear that the field notes above indicated do not describe the land as of the character granted by said acts and if, as counsel alleges in his appeal, your office decision was erroneous in stating that the State applied to have the field notes made the basis for adjustment, and such request was acceded to, then the State would not be bound to accept the field notes as the basis of adjustment. Counsel for the State, however, in his letter addressed to your office, upon which said decision was rendered, asks that your office rule that where the field notes describe the character of the land as above, they are swamp or overflowed within the meaning of the grant; that the claim of the State to the lands in question shall be allowed on the basis of the field notes, and in case of a refusal of that request that a field examination

be resorted to, to determine "whether the lands described as above were swamp or overflowed within the meaning of the grant at its date."

In the argument of counsel filed in this Department it is stated that "Nearly all the lands in said State were surveyed prior to March 2, 1849, and in perfecting a plan by which swamp selections could be made under the provisions of the said act the field notes made by the United States deputy surveyors were *agreed upon as the basis* as being a substantial compliance with the law, and have ever since been so recognized, and until very recently held as conclusive as to the character of the land." This statement does not appear to be in harmony with the rules issued under said act of 1849 (*supra*), which expressly provided that "where lands have been represented by the field notes as overflowed or swamp lands, but which are now believed *not* to be of that character, they should be now examined in reference to those points before deciding whether or not they shall enure to the State under the act." And in your office regulations, dated April 18, 1882, (Public Domain, 699), it is stated that "In Louisiana the selections under the grant of March 2, 1849, forming the bulk of the selections in said State, are made in accordance with the terms of said act by deputy surveyors under the direction of the United States surveyor-general, at the expense of the State. Lands claimed under the act of September 28, 1850, are selected by agents of the State, and proof of the character of the land is furnished." *That the basis for the selections is the field notes.*

If it be true that there has been no agreement between the State of Louisiana and the United States to adjust said grants upon the basis of the field notes, then, unquestionably, the State has a right to submit proof tending to show that the land claimed is of the character granted; but if the agreement has been made to make the field notes the basis of the adjustment, then those notes must clearly show that the land is of the character granted to the State under said acts (1 Lester, 553-603).

It is to be observed that most of the surveys of Louisiana were made prior to the passage of said act of 1849, and while the deputy surveyors were required to describe in their field notes the character of the land, the kind of timber, and all the swamps therein, yet they were not required to make the surveys with special reference to the swamp land acts. The instructions to the surveyors-general of public lands, published February 22, 1855, being a revision of the manual prepared in 1851, and referring to said act of 1850, advised the deputy surveyors that, "In order clearly to define the quantity and locality of such lands, the field notes of surveys, in addition to the other objects of topography, required to be noted, are to indicate the points at which you enter all lands which are evidently subject to such grant and to show the distinctive character of the land so noted, whether it is a swamp or marsh, or otherwise subject to inundation to an extent that without artificial means would render it 'unfit for cultivation.' The depth of inundation

is to be stated as determined from indications on the trees where timber exists; and its frequency is to be set forth as accurately as may be, either from your own knowledge of the general character of the stream which overflows, or from reliable information to be obtained from others."

The general rule is that public officers are presumed to do their duty as the law requires. (Lawson on Presumptive Evidence, p. 53, and numerous cases cited therein.) The field notes of survey, made subsequently to the passage of said acts, must be presumed, in the absence of evidence to the contrary, to properly designate the character of the lands described with reference to said grants. But no such presumption attaches to the field notes of survey made prior to the passage of said acts. This presumption is not absolutely conclusive. The correctness of the surveys may be impeached for fraud or mistake, even when there has been an election by the State to accept the field notes of survey as the basis of the adjustment. This was expressly ruled by this Department in the case of *Lachance v. The State of Minnesota* (4 L. D., 479). If the correctness of the field notes and surveys made subsequent to the passage of said acts is denied, the burden of proof is upon the party making such denial, and on the contrary, the burden of proof is upon the State to show that the lands embraced in surveys made prior to said acts were of the character granted at the date of said acts.

In the case of the State of Oregon (5 L. D., 31), it was held that the scheme of adjustment lies within the discretion of the Secretary of the Interior, and he may vary the same, if he deems best, where the status of the land remains undetermined, and that "it is immaterial what means are employed, the essential object being the ascertainment of the character of the land."

I am not unmindful of the fact that the interests of the government and of the State require that its claim shall be speedily adjusted. Nearly forty years have passed since the passage of the first named act, and under said grant many millions of acres were selected by the States, including a large amount of land that was not of the character granted. While it is doubtless true, as stated by counsel in his letter to your office, "that many lands which have been patented as 'swamp' that are not so in fact, were included in the list confirmed by Congress to the States by the act indicated" (1857), yet, if it be shown satisfactorily that any tracts have not been listed, which are of the character granted, it is clearly the duty of the Secretary of the Interior to cause such tracts to be listed and the lists approved without delay. But in ascertaining whether lands claimed by the States pass under the grant, if there is doubt, the decision must be against the grantee. *United States v. Gratiot* (14 Peters, 526); *Irvine v. Marshall* (20 Howard, 558); *The Dubuque & Pacific R. R. Co. v. Litchfield* (23 Howard, 66).

Since there appears to be a misunderstanding between the counsel for the State and your office relative to his request and your action

thereon, and the record failing to show any written agreement on the part of the State to accept the field notes as the basis of adjustment, I have to direct that you will advise said counsel that the State can elect whether the field notes of survey shall be made the basis of the final adjustment of said grants, and in case such election is made you will proceed to list any tracts that appear by the field notes to be clearly of the character granted, unless there is reason to believe that the field notes and survey are false and fraudulent. Where the field notes of survey have been made since the passage of the act of 1849 and with reference thereto, they will be held to entitle the State *prima facie* to the lands returned as swamp and overflowed, without the additional words "made unfit thereby for cultivation;" but where made before the passage of that act, all the descriptive words in the grant, or words clearly of a like import, must appear; and where they do not so appear, the State must show by other satisfactory evidence that the lands claimed are of the class contemplated by the grant. If the State does not elect to take by the field notes of survey, then the State should be allowed to furnish satisfactory proof that the lands claimed were swamp and overflowed and rendered thereby unfit for cultivation at the date of the grant. The State should be required to designate specifically the act under which she claims, and should she elect to furnish additional testimony, showing the character of the particular tracts named, your office will duly consider the same and transmit to this Department for approval lists of such lands as the evidence shows the State to be entitled to under said acts.

The decision of your office is modified accordingly, and the papers in the case are herewith returned.

INDIAN ALLOTMENTS—ACT OF FEBRUARY 8, 1887.

INSTRUCTIONS.

Indians that have heretofore received an allotment of a less quantity of land than provided in said act should receive thereunder an additional allotment sufficient to make the entire amount equal to that named in said act.

Allotments may be made by the regular agents in charge of the respective reservations, or, in the absence of such agents, by special agents appointed for that purpose.

The provisions of said act are to be carried into execution under such rules and regulations as may have been, or may be, authorized and prescribed by the President. All patents hereafter issued to Indians embraced within the provisions of said act should be in the form prescribed in the act.

Acting Secretary Muldrow to the Commissioner of Indian Affairs, March 29, 1887.

Referring to your letter of the 25th ultimo requesting a construction of certain sections of the Act of February 8, 1887, providing "for the allotment of lands in severalty to Indians on the various reserva-

tions," etc., I transmit herewith an opinion of 5th instant by the Assistant Attorney General for this Department, for your information and guidance upon the matters of inquiry so presented by you.

*Assistant Attorney General Montgomery to Acting Secretary Muldrow,
March 5, 1887.*

Agreeably to your request, I have examined the communication of the Hon. Commissioner of Indian Affairs, addressed to you and bearing date February 25th ultimo, calling for a construction of certain sections of an act entitled "An act to provide for the allotment in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes." Approved February 8, 1887. And in answer to your request for an expression of my opinion on the several questions presented in said communication, I beg leave to submit the following:

Section 1 of said act provides:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

As will be observed, while this section specifically provides for protecting the vested rights of all Indians holding lands under previous legislative or treaty provisions, in excess of the quantity herein designated, it makes no specific mention of another class of cases, where under act of Congress or treaty stipulation certain Indians already hold

in severalty a *less* quantity than that designated in the section above quoted; and the question now presented is, whether or not the "Indians who have received allotments of eighty acres each shall receive an additional allotment sufficient to make the entire quantity of land allotted equal to the quantity named in the act"?

If this statute were to be construed according to its strict letter, without any reference to its evident object, its language would seem sufficiently broad to entitle each of such holders, not only to enough additional land to raise his entire holding to the quantity specified in said section, but to have said designated quantity set apart to him without any deduction on account of such previous holding. Yet, a careful consideration of the entire section renders it apparent that such could not have been the intention of Congress.

The evident purpose of this statute seems to be to secure to all the members of certain Indian tribes, in severalty, a given quantity of land, corresponding with the supposed necessities of each. For example, it provides for setting apart "to each head of a family, one-quarter section; to each single person over eighteen years of age, one-eighth of a section," etc.

And when the allotted lands are only valuable for grazing purposes "an additional allotment of such grazing lands shall be made to each individual."

While there were uncontrollable constitutional reasons for not interfering with the vested property rights of those Indians who already held title to more lands than this statute would have allotted them, there were evidently no reasons for imposing a penalty on another class of Indians, by limiting them to *half* the quantity of land to which they *would* have been entitled had this act found them landless. I therefore agree with the view expressed by the Hon. Commissioner of Indian Affairs, that each Indian who has heretofore received an allotment of a *less* quantity of land than is provided for in the said act of February 8, 1877, should receive an additional allotment sufficient to make the entire quantity allotted equal to that named in said act.

The next question presented relates to Section 3 of said act, which reads thus:

That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action and to be deposited in the General Land Office.

The question arising under this section is, whether the making of the allotments provided for must be the joint work both of special agents appointed for that purpose, and of the regular agents; or whether such

allotments may be made by either special or regular agents, without the concurrence of the other.

Upon this question I am also disposed to concur with the Hon. Commissioner, that it is "The intent of this section to provide that the allotments shall be made, either by special agents appointed for the purpose, or by the agents in charge of the respective reservations."

It is true the act in question says: "That the allotments . . . shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations," etc. But in the language of Bouvier's Law Dictionary (Vol. 1, p. 371): "There are many cases in law where the conjunctive *and* is used for the disjunctive *or*, and *vice versa*."

Again, in *State v. Meyers*, 10 Iowa, 448 (cited in Sedgwick on the Construction of Statutory and Constitutional Law, 371), the court said: "*And* and *or* are convertible terms, as the sense of the statute may require, even in a criminal statute."

By construing the above quoted section 3, in connection with the proviso in section 2 of the act under consideration, it becomes quite apparent that the disjunctive *or* may properly be substituted for *and* before the words "the agents in charge" etc., in said section three.

Said proviso reads thus:

That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by Indians; and patents shall issue in like manner.

By reading this proviso in connection with section 3 immediately following it, declaring "That the allotments provided for in this act shall be made by special agents . . . and the agents in charge of the respective reservations," etc. it seems quite apparent that Congress intended that in cases where there are regular agents in charge of reservations within which allotments are to be made, such allotments should be made by them. But that where there are no regular agents, then special agents appointed by the President for that purpose should discharge this duty.

The question is also submitted for my consideration, as to whether or not, under the said act, "The formal order of the President should be obtained before directing allotments to be made on any reservation, particularly where allotments have been made heretofore as in the case of the reservation referred to"?

Somewhat similar questions to this have repeatedly been adjudicated by the United States supreme court in cases where the various heads of departments had performed duties which certain acts of Congress had imposed upon the President; and the general tenor of adjudications on these questions has been to the effect that as a rule the Presi-

dent may, through each head of a department, perform such presidential duties as peculiarly appertain to the business of such Department.

Thus, in *Williams v. The United States* (1 Howard, 290), it was held that—

The act of Congress passed January 31, 1823, prohibiting the advance of public money in any case whatever to the disbursing officers of the government, except under the special direction of the President, does not require the personal and ministerial performance of this duty to be exercised in every instance by the President, under his own hand.

In the same case the court said:

The President's duty in general requires his superintendence of the administration; yet his duty can not require him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which nevertheless he is in a correct sense, by the constitution and laws, required and expected to perform.

Because—said the court—

If it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer.

Again, in *Wilcox v. Jackson* (13 Peters, 498), when construing an act of Congress of 1830, which provided in effect—among other things—that all lands should be “Exempted from pre-emption which are reserved from sale by the President of the United States,”

The supreme court said—

“The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.” In said case it was held that “A reservation of lands made at the request of the Secretary of War for purposes in his department must be considered as made by the President of the United States, within the terms of the act of Congress.” This same doctrine was again strongly re-affirmed in *Wolsey v. Chapman*, 101 U. S., 755.

It should be borne in mind, however, that the validity of supposed presidential acts, when performed through any of the various heads of departments, depend after all upon the assent of the President, either express or implied.

While it is not to be expected that the President can personally consider or be personally consulted with reference to every presidential official act performed through the heads of departments, it nevertheless seems to be within the spirit and policy of the law that such of these acts as he does not specifically authorize should (at least as an evidence of the presidential sanction) come within the scope of some general rule or well-defined departmental practice, which bears the seal of the President's express or implied approval.

Coming more directly to the question under consideration, section 465 of the Revised Statutes provides that—

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian Affairs, and for the settlement of the accounts of Indian affairs.

And section 463 provides that—

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Here we have—as it seems to me—clearly defined the duties of the President, of the Secretary of the Interior, and of the Commissioner of Indian Affairs, with reference to the act in question. Unless there is already some existing rule authorized by the President which is sufficiently broad to meet the requirements of said act, it devolves upon the President to prescribe such rule or rules; and it becomes the duty of the Hon. Commissioner of Indian Affairs, under the direction of the Hon. Secretary of the Interior, to carry into effect the provisions of said act, agreeably to such regulations as either have been or may be prescribed or authorized by the President.

Still another question submitted is, whether or not “all patents hereafter issued to Indians embraced within the provisions of said act should be in the form prescribed in the act,” or whether patents for lands already held in severalty by certain Indians, in pursuance of previous acts of Congress or of treaty stipulation, should be in the form prescribed by such acts or treaty?

It seems to me that sections 1 and 5 of said act, when read together, furnish an unmistakable answer as to what was the Congressional will in the premises. It will be remembered that one of the provisos incorporated in said section 1 is to the effect—“That where the treaty or act of Congress setting apart a reservation provides also for the allotment of lands in severalty in quantities in *excess* of those herein provided for, the President, in making allotments upon such reservation shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act.”

Section 5 provides “That upon the approval of the allotments provided for in this act by the Secretary of the Interior” meaning, of course, *all* allotments provided for by this act—“He shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian, etc.”

Inasmuch, then, as Congress prescribes but this *one kind* of patent for *all* these Indian allotments, and inasmuch as the allotments so provided for embrace the lands held in severalty under previous acts of Congress or treaty stipulation (as well as lands not so held), I can see no escape from the conclusion that Congress intended the one form of patent for both classes of allotments.

I do not here undertake to discuss the question as to the legal effect which a patent thus issued might or might not have upon property rights—if any there are—already vested in individual Indians under

existing treaties or former acts of Congress, in the event that such vested rights should be found incompatible with the terms of the patent.

While perfectly satisfied that no vested property right can be—or was intended by Congress to be—divested by means of such patents, I have no doubt as to the duty of the Secretary to cause them to be issued, in conformity with the terms of the statute.

I return herewith the communication of the Hon. Commissioner of Indian Affairs and the accompanying copy of the act to which it refers.

PRACTICE—PRE-EMPTION FILING.

JAMES ET AL. v. NOLAN.

When a pre-emptor applies to file a declaratory statement for land embraced in an entry of record, alleging settlement prior to the date of such entry, the proper practice is to order a hearing to determine the respective rights of the parties.

Acting Secretary Muldrow to Commissioner Sparks, March 23, 1887.

The land involved in this case is the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and lots 4 and 5, Sec. 24, T. 14 N., R. 67 W., Cheyenne, Wyoming Territory, and was formerly embraced in desert entry No. 25, made by James Talbot, November 17, 1877, and canceled by departmental decision of February 26, 1885, notice of which issued from the local office on the morning of March 3, 1885.

At 10:30 A. M., same day, lots 4 and 5 were entered in the name of James R. Martin, guardian of James W. Martin, minor child of William J. Martin, deceased, per soldier's additional homestead entry No. 905, and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ was entered in the name of Calvin James, per soldier's additional homestead entry No. 906. At 11 A. M., same day, the pre-emption declaratory statement of Francis Nolan was presented at the local office for all the tracts above specified, settlement alleged February 19, 1885, and the same was rejected because the land was embraced in the additional homestead entries above mentioned, and for the further reason that at date of alleged settlement the land was embraced in an uncanceled entry, and therefore not subject to settlement or entry.

April 1, 1885, Nolan filed an amended declaratory statement, alleging that at date of cancellation of the said desert entry of Talbot, he was an actual settler on the land embraced by his filing, and was residing there. He further alleges that on February 19, 1885, he purchased for a valuable consideration the improvements on said land, consisting of a dwelling house and some wire fencing, etc., and established a residence thereon, and that his residence has been continuous since that date. He therefore asked a hearing to show his superior right to the land.

The local office declined to accept this latter declaratory statement, and transmitted the whole record to your office, which, by decision dated July 31, 1885, ordered the local office to receive and file said declaratory statement as of date of presentation, and hold said soldier's additional homestead entries subject to it, the rights of the parties to be determined on contest, or when the pre-emptor makes final proof. From this decision an appeal is brought here and the case has been considered.

I am of opinion that the action of your office in this case is erroneous. Where a pre-emptor applies to file a declaratory statement for land embraced in an entry of record, alleging settlement prior to the date of such entry, the proper practice is to order a hearing to determine the respective rights of the parties. The decision of your office is therefore reversed, and you will direct the local office to order a hearing in this case in accordance with the prayer of the pre-emptor.

REPAYMENT—DESERT LAND ENTRY.

HIRAM H. STONE.

Repayment may be allowed in case of an entry made in good faith where the same cannot be confirmed in its entirety.

Acting Secretary Muldrow to Commissioner Sparks, March 24, 1887.

On January 15, 1878, Hiram H. Stone made desert land entry at the land office of Bozeman, Montana. On the filing of the plat of survey on February 19, 1879, the entry was found to embrace Lots 1, 2, 3, 4, 5, 6, and 7 of Sec. 4, and Lots 1, 2, 5, 6, and 7, the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 5, T. 2 S., R. 25 E.

On March 31, 1879, William M. Rogers made application to file pre-emption declaratory statement for the tracts above described in section 4, alleging settlement December 4, 1877. The application was rejected by the local officers on account of the entry of Stone, and Rogers then filed an affidavit of contest, alleging that the land was not desert in character. A hearing was had to determine the truth of said allegation, and also the date of Rogers's settlement. Upon the testimony the local officers recommended that the entry be allowed to stand, and the claim of Rogers be rejected. The case was transmitted to your office.

By letter of June 15, 1880, the local officers forwarded to your office the relinquishment of said entry by Stone. Your office thereupon, by letter of July 8, 1880, closed the case, allowed the filing of Rogers to go to record, and further stated: "The application of Stone for the return of his first payment money will be considered hereafter, and will form the subject of another communication."

By letter of May 11, 1885, your office decided the question of repayment, and held: "The applicant relinquished his entry to avoid a con-

test with one Rogers, a pre-emptor. The law governing the return of purchase money does not provide for repayment in cases where parties voluntarily relinquish their entries, and I have therefore to decline to recommend the repayment asked for." Claimant appealed. His appeal admits that he relinquished the entry "to avoid further contest."

An inspection of the records of your office shows that the lands lie within the limits of the grant to the Northern Pacific Railroad Company; and that said section five is a granted section. The map of general route along this portion of the line was filed February 21, 1872, and the withdrawal thereon was ordered April 22 following, notice of which reached the local office May 6, 1872. After the withdrawal, to wit, on January 15, 1878, Stone made entry. The filing of the plat of survey on February 19, 1879, disclosed the fact that the greater portion of his entry (286.78 acres, he alleges,) fell in a section granted to said railroad company. It seems clear that such portion of the entry could not be confirmed.

The act of June 16, 1880, provides that—

In all cases where homestead or timber-culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed, and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said lands (21 Stat., 287.)

I am of opinion that under the statute applicant is entitled to repayment of the amount paid on that portion of his entry falling within said section five.

The remainder of the entry, he claims, embraces but 211.32 acres, lying in said section four. There seems to be no reason why that portion of the entry could not be confirmed. In a contest involving the character of the land, and the priority of right to the tract, the local office had rendered a decision in favor of the entryman, and that decision was never reversed. The relinquishment made under these circumstances was entirely voluntary, and, if no other element entered the case, I agree with your office in holding that repayment could not be made.

The desert land law allows six hundred and forty acres to be taken in one entry. The portion of the entry in question embraces but little over two hundred acres. To hold that the entryman in this case was obliged to complete the entry for that portion lying in section four would be to restrict his statutory allowance, and to punish him for pursuing the law. For the desert land law permitted entries before survey, and at that time it could not be ascertained that a portion of his entry would fall in a section granted to said railroad company. The act of June 16, 1880, provides for repayment in cases where the entry cannot

be confirmed. It seems a consistent construction of that statute to hold that it contemplates repayment in cases where the entry is made in good faith, and cannot be confirmed in its entirety. In this view applicant is entitled to repayment of the money paid on said entry.

Said decision is accordingly reversed.

RAILROAD GRANT—WITHDRAWAL; ACT OF JUNE 15, 1880.

NORTHERN PAC. R. R. CO. v. McLEAN.

The existence of a pre-emption claim, capable of being perfected, at the date of withdrawal on general route, excepts the land covered thereby from the effect of such withdrawal.

The right of purchase, under the act of June 15, 1880, within the limits of the grant, is accorded the widow of an entryman, though the entry was canceled prior to definite location for failure to make final proof, and the application was made subsequently thereto.

Acting Secretary Muldrow to Commissioner Sparks, March 28, 1887.

William H. McLean made homestead entry of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 17, T. 10 N., R. 3 W., Helena, Montana, May 3, 1872. This tract is within the limits of the withdrawal of the odd numbered sections for the benefit of the Northern Pacific Railroad Company, upon map of general route filed February 21, 1872. The withdrawal was made February 21, 1872, notice of which was received at the local office May 6, 1872. It is also within the forty mile limit of said road, as fixed by the map of definite location, filed July 6, 1882.

The letter of withdrawal directed that it should take effect from the date of its receipt at the local office. Subsequently the Secretary decided that said withdrawal took effect upon the filing and acceptance of the map of general route. Whereupon, on December 1, 1874, McLean's entry was held for cancellation, subject to appeal, but no appeal was taken from said decision.

July 3, 1879, the local officers reported that McLean had been notified, pursuant to office circular of December 20, 1873, to show cause within thirty days why his entry should not be canceled for failure to make proof of compliance with the law within the statutory period, and failing to respond to such notice, his entry was canceled September 11, 1879, and no appeal was taken from that action.

McLean died the 20th day of August, 1882, and Maria McLean—his widow—on March 15, 1883, made application to purchase said tract under the act of June 15, 1880, upon the ground that her husband's entry was confirmed by the first section of the act of April 21, 1876 (19 Stat., 35), and that payment for the land under the act of June 15, 1880,

is equivalent to proof of compliance with the provisions of the homestead law.

Your office awarded to Mrs. McLean the right to purchase, holding that under the act of June 15, 1880, it became optional with a homestead entryman either to make proof of compliance with the provisions of the homestead law, or to purchase the land, and that payment for the land is accepted in lieu of such proof, from which decision the company appealed.

At the date of the withdrawal this tract was covered by the following pre-emption filings:

A. J. Wetter for the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, with other tracts, May 13, 1868, alleging settlement same day.

William M. Scott, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, with other tracts, October 5, 1868, alleging settlement same day, amended October 14, 1872, excluding said tract.

Jerome S. Glick, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, with other tracts, November 27, 1868, alleging settlement same day.

Robert C. Wallace, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, with other tracts, December 13, 1869, alleging settlement same day.

Prior to the act of July 14, 1870, no time had been prescribed within which pre-emptors were required to make proof and payment for their claims on unoffered lands; but that act provided that nothing in the act of March 27, 1854, "shall be construed to relieve settlers on lands reserved for railroad purposes from the obligation to file the proper notices of their claims, as in other cases; and all claimants of pre-emption rights shall hereafter, when no shorter period of time is now prescribed by law, make proof and payment for the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired."

The act of March 3, 1871, extended the time within which proof and payment shall be made, one year; and this provision has since been in force and was subsequently incorporated in the Revised Statutes as section 2267, which provides that all claimants of pre-emption rights upon unoffered lands shall make proper proof and payment for the land claimed within thirty months after the date prescribed for filing their declaratory notices has expired.

It therefore appears that at the date of the withdrawal a pre-emption claim to the land in controversy was subsisting, capable of being perfected, and hence this tract of land not being affected by the withdrawal for the benefit of the road, the homestead entry of McLean was not controlled by the act of April 21, 1876.

In the case of the Northern Pacific Railroad Company *v.* Burt (3 L. D., 490), the Department held that the widow of an entryman had the right to purchase under the act of June 15, 1880, although the entry had been canceled for failure to make proof within the statutory period prior to the definite location of the road, and although the application to purchase was made subsequent thereto, following a long line of de-

partmental decisions. See also *Gilbert v. Spearing* (4 L. D., 463), *Holmes v. Northern Pacific R. R. Co.* (5 id., 333.)

Applying this rule to the case at bar, Mrs. McLean should be allowed to purchase, and for this reason I affirm your decision.

VIRGINIA MILITARY LAND WARRANT—SCRIP.

HEIRS OF ISHAM FLOYD.

All claims properly allowed under the laws of the State, prior to March 1, 1852, are entitled to recognition and to satisfaction in scrip, without respect to the time when the warrant was issued by the register of the State land office.

Acting Secretary Muldrow to Commissioner Sparks, March 28, 1887.

I have considered the appeal filed in behalf of the heirs of Isham Floyd from your decision, dated August 10, 1886, refusing to recommend the issuance of scrip on account of land office military warrant No. 9956, allowed and issued, under the laws of Virginia, to L. Floyd Nock, administrator of Isham Floyd, deceased, his heirs or assigns.

This claim is brought under the acts of Congress, approved respectively August 31, 1852 (10 Stat., 148), and June 22, 1860 (12 Stat., 84).

The act of 1852 was entitled: "An act making further provisions for the satisfaction of Virginia land warrants," and section one thereof provided:

That all unsatisfied outstanding military land warrants, or parts of warrants, issued or allowed prior to the first day of March, eighteen hundred and fifty-two, by the proper authorities of the Commonwealth of Virginia, for military services performed by the officers and soldiers, seamen or marines, of the Virginia State and Continental lines, in the army or navy of the Revolution, may be surrendered to the Secretary of the Interior, who, upon being satisfied, by a revision of the proofs, or by additional testimony, that any warrant thus surrendered was fairly and justly issued in pursuance of the laws of said Commonwealth, for military services so rendered, shall issue land-scrip in favor of the present proprietors of any warrant thus surrendered, for the whole or any portion thereof yet unsatisfied, etc.

In the administration of this law, the land department ruled, following an opinion of the Attorney-General on the subject, that the words "allowed" and "issued," as used in the act, were synonymous, and that scrip could issue only in those cases in which the warrants upon which it rested had been allowed *and issued* prior to March 1, 1852.

It appears there were many cases in which there having been an allowance of land bounty by the governor of Virginia prior to March 1, 1852, the warrants on said allowances did not actually issue until after said date. The warrants were issued by the register of the State land office on the finding of the governor. Under the ruling above indicated, the Department refused to issue scrip in all cases where the State warrants had not been actually issued prior to March 1, 1852.

Congress evidently was not satisfied with this construction of the act of 1852, for on the 22d of June, 1860, an act was approved entitled, "An act to declare the meaning of the act entitled 'An act making further provisions for the satisfaction of Virginia land warrants,' passed August thirty-one, eighteen hundred and fifty-two."

Said act provided:

That the Secretary of the Interior, in executing the provisions of the act passed August thirty-one, eighteen hundred and fifty two,..... be required so to construe the same as to authorize the satisfaction in scrip of all warrants or parts of warrants issued on allowances made by the executive of Virginia prior to the first day of March, eighteen hundred and fifty-two, coming within the principles already recognized by the Department of the Interior in the execution of the provisions of the said act, and whether issued before or since the first day of March, eighteen hundred and fifty-two: *Provided, however,* That no warrant or part of a warrant shall be satisfied in scrip, founded or issued on any allowance made by the executive of Virginia since the first day of March, eighteen hundred and fifty-two.

In the case under consideration, the allowance of land bounty was made March 19, 1834, by the governor, who then gave direction that "the register will issue a warrant accordingly." The warrant did not issue until November 13, 1884. It is now before me, and is for two hundred acres of land to L. Floyd Nock, administrator of Isham Floyd, deceased, his heirs or assigns.

Your decision holds that the word "since" in the phrase "whether issued before or since the first day of March, eighteen hundred and fifty-two," in the act of 1860, relates to the intervening time between the passage of the act of 1852 and of the act of June 22, 1860, and you therefore refuse to recognize a warrant issued since the last named date. In this I think you err. The present case is I understand the first of the kind rejected since the passage of the act of 1860, while many during the period named have been approved by your office and scrip has issued thereon. Much weight is to be attached to a continuous practice and uniform construction one way through a period of more than a quarter of a century.

Whenever an act of Congress has, by actual decision, or by continued usage and practice, received a construction of the proper department, and that construction has been acted upon for a succession of years, it must be a strong and palpable case of error and injustice to justify a change in the interpretation to be given it. (2 Op. 558; 10 lb., 52).

When there is ambiguity or doubt in the construction of a statute, a long continued construction of it in practice in a department would be in the highest degree persuasive, if not absolutely controlling, in its effect. *United States v. Graham* (110 U. S., 219).

In this case, however, there is in my mind no doubt as to the proper construction of the act of 1860, although doubt is suggested by the fact that you have placed upon the law a construction different from that which had previously to your decision in question been entertained and acted upon. The meaning to be attached to the word "since" as used

in the act, if considered in the light of its ordinary use, may admit of doubt, but certainly the signification given it by your decision is not fixed, certain or conclusive. Worcester defines the word as meaning "after; from the time of," while Webster defines it to mean "from the time of; in or during the time subsequent to; subsequently to; after."

These definitions attach a broad significance to the word and taking as a basis or starting point the initial date to which the word must necessarily relate, it clearly indicates a reference to the future generally, without limitation or restriction.

When the context of the act of 1860, the character of the legislation, its general scope and purpose, the facts and circumstances which rendered it necessary are considered, there can, I think, be no doubt as to its meaning as used in said act.

Virginia had claims to certain lands in what was known as the Virginia military land district in southern Ohio. These lands had been reserved to her to enable her to make good her pledges in bounty land to certain classes of her officers, soldiers, seamen and marines, for their services in the war of the Revolution.

In consideration of the act of 1852, authorizing the issuance of scrip in satisfaction of her military land warrants, the State was required by said act to relinquish all claim to the lands in the Virginia military land district in the State of Ohio. This she did by resolution of her General Assembly, passed December 6, 1852.

It was supposed by the State that the act of Congress of 1852 made provision for all land warrants issued or allowed under her laws. She could not in good faith with her grantees have accepted the act of Congress on any other understanding. The construction placed upon the act by the Attorney General, whose opinion was followed by this Department, made it evident that she could not under the law as it then stood see a fulfillment of her pledges to her soldiers of the Revolution. Further legislation was therefore sought and the result was the act of 1860. The fact that Congress further legislated on the subject shows clearly its purpose to fully satisfy all claims which had been recognized by the State under her laws. It is to be noted that the act of 1860 does not purport to grant any new right. Its purpose, as stated in its caption, is "to declare the meaning" of the act of 1852, and the body of the act requires a certain construction of said act of 1852.

That construction was much more liberal than that which had been placed upon the act by the Department, and it cannot I think be doubted, in view of all the facts and circumstances, that Congress intended to make good, by the issuance of scrip, all the pledges which the State of Virginia had given to her revolutionary soldiers and sailors, whose claims she had adjudicated and allowed prior to March 1, 1852.

In short, I am satisfied that the word "since," as used in the act of June 22, 1860, is to be construed, in the administration of the act, in the sense of the word "after," and that all claims properly allowed under

the laws of the State of Virginia prior to March 1, 1852, are entitled to recognition by your office and to satisfaction in scrip, upon the surrender of the unsatisfied outstanding military land warrant based upon such allowance, it matters not when such warrant was actually issued by the register of the State land office.

The limitation as to these claims is to be found only in the date of their allowance by the State, and not in the date of their issuance.

You will recognize and act upon the military warrant, No. 9956, in question, in accordance with the views herein expressed.

HOMESTEAD ENTRY—AMENDMENT.

DANIEL KEESEE.

Amendment of an entry will not be allowed on the ground that a tract is now subject to appropriation which was excluded therefrom at the date of applicant's entry.

Acting Secretary Muldrow to Commissioner Sparks, March 28, 1887.

I have considered the case arising upon the appeal of Daniel Keesee from your office decision of May 25, 1886, refusing to allow him to amend his homestead entry No. 884, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, of Sec. 4, T. 23, R. 48, Pueblo district, Colorado.

Claimant swears that he "settled upon the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ "—not specifying the locality more definitely than this—in 1876; that being a poor man he did not make his entry until January 21, 1877; that then, on applying at the local land office, he found that two of the forties he had *intended* to enter—to wit, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 4—had been entered by one James W. Chadwick; that he then entered the tract first above described; that said Chadwick never complied with the requirements of the homestead law; that claimant thereupon procured the cancellation of Chadwick's said homestead entry (October 28, 1880); and the land covered by said Chadwick's (now canceled) homestead entry having become by virtue of said cancellation public land, claimant applies to be permitted to amend his entry so as to embrace the said NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, in lieu of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ —the former being the land which he *originally intended* to enter. He alleges moreover, that "The S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ is cut off from my claim by the county road, and to fence it requires about one mile or more fencing, and this expense I can not afford, as I am a poor man; and without fencing in this cattle country I can not protect and preserve it for my own use."

The Department has always permitted the amendment of an entry, in the sense of the correction of an incorrect record (where an error had

been made whereby the record failed to describe correctly the land which the claimant *intended* to enter), provided no superior adverse right intervened prior to the application to amend. (See 2 C. L. O., 162; 2 L. D., 170; *ib.*, 575; 3 L. D., 157; *ib.*, 413; 4 L. D., 365.)

But "the Department is slow to act favorably upon applications to amend entries deliberately made in accordance with the intention of the applicant" (Florey and Moat, 4 L. D., 365). In the case last cited such amendment was allowed; but the applicant had suffered injury from the mistake of the local officers in making an erroneous record. The Department has gone so far as to intimate that "such amendment might be allowed as a matter of equity to relieve a conflict of claims by taking a clearly vacant tract" (Neubert v. Middendorf, 10 C. L. O., 34). But the Department, so far as I am aware, has never allowed an amendment simply because the claimant had changed his mind, or because a tract which he preferred had come into market after he made his entry. I see no good reason for disturbing your decision refusing Keesee's application to amend, and therefore affirm the same.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

GEORGE E. SANDFORD.

The right of purchase conferred by the second section of the act of June 15, 1880, not being dependent upon compliance with, or qualifications under the homestead law, nor subject to any other restrictions than are imposed in case of ordinary cash entry, is not defeated by contract of sale made prior to purchase.

Acting Secretary Muldrow to Commissioner Sparks, March 31, 1887.

I am in receipt of your letter of March 12, 1887, and accompanying papers, relating to cash entry No. 766, for SW. $\frac{1}{4}$ of Sec. 24, T. 15 N., R. 22 W., 6th P. M., North Platte land district, Nebraska.

It appears that George E. Sandford made homestead entry of said tract January 9, 1880, and purchased the same under the second section of the act of June 15, 1880 (21 Stat., 237), and on April 13, 1883, received cash entry certificate for the same, on which patent was issued October 26, 1883. On September 10, 1885, the tract was visited by Special Agent George B. Coburn, who reported that the land was then in possession of the Brighton Ranch Company, to which company the county records showed it had been conveyed by deed, executed on May 11, 1883—about one month after final certificate had issued to Sandford—but the special agent reported that, in point of fact, the land had been actually sold by Sandford prior to the issue of the certificate.

In support of this assertion is transmitted the affidavit of Sandford, dated September 3, 1885, wherein he states that he settled upon this same land as far back as 1876, first filed a pre-emption declaratory statement and later a homestead entry thereon, which was done in good

faith and for his own use and benefit; had a shanty, stable, and five or six acres in cultivation, and also worked about and occasionally for the Brighton Ranch Company; that said company fenced the surrounding country, thus enclosing his homestead claim, against his protest, and that their cattle destroyed his crops; that a short time prior to purchasing said tract he made arrangements with Ferdinand Zimmerer, representing the Brighton Ranch Company, to sell to him said tract for the sum of \$500; that at the time the cash entry certificate was given said Zimmerer paid the receiver the price of said land and afterwards paid to him, Sandford, the balance of the said sum of \$500. The special agent states that Zimmerer will corroborate said statements as to the sale and payments, but does not furnish his affidavit.

On this state of facts you recommend that the Attorney General be requested to institute suit for the purpose of setting aside the patent issued for said lands.

That portion of the act of June 15, 1880, under which the purchase by Sandford was made is as follows:

That persons, who have heretofore, under any of the homestead laws, entered lands properly subject to such entry may entitle themselves to said lands by paying the government price therefor.

This language is plain and unambiguous, and annexes no conditions or prerequisite to the purchase of lands theretofore properly entered under any of the homestead laws, other than the freedom of the tract in question, from adverse claim, and the payment by the applicant of the proper government price. No requirement is made as to proof of having complied with the demands of the homestead law as to residence, improvement, or cultivation, or non-alienation, as in the case of obtaining title to lands under the homestead laws. In short, this is a right to purchase, by cash entry, lands theretofore entered under the homestead laws, in the same way and without other restrictions than are imposed in the case of ordinary private cash entry; that is to say, the land must be subject to such sale and the price must be paid.

This has been the uniform construction which this second section of said act has received in the land department, from its passage to the present day, and I do not see how any other could have been placed upon it.

In the circular of instructions, relating to the act in question, issued by the Commissioner of the General Land Office, and approved by the Secretary of the Interior on October 9, 1880 (1 C. L. L., 497), it is said: "Applications to purchase under the second section will be made as in the case of ordinary cash entry." "Final homestead proof not being required in these cases, no advertisement or notice of intention to make final proof is necessary and no final homestead fees are to be paid or collected." These same instructions are repeated in the General Circular of March 1, 1884, pp. 16 and 17—the latest issued by the land department.

There is then nothing in the law authorizing the entryman to make a purchase under said section and act, or in the regulations of the Land Department, which prohibits him from making such contract of future sale, as is here shown to have been made. The party, having made the entry, could "entitle" himself absolutely to the tract covered by it, by paying the price therefor. And the fact that he made a previous agreement to sell can in no way, so far as I can see, in the absence of a prohibition to that effect, impair this right of purchase. No law was violated and no fraud practiced, but a clear legal right was exercised, both as to the purchase and sale.

I therefore decline to concur in the recommendation to the Attorney General.

PRE-EMPTION; OSAGE TRUST LANDS.

TODD KNEPPLE.

By filing Osage declaratory statement and perfecting entry thereunder in accordance with the act of May 28, 1880, the right of pre-emption to such, or any other lands, is thereby exhausted.

Acting Secretary Muldrow to Commissioner Sparks, March 31, 1887.

This is an appeal from your decision of February 19th last, affirming the action of the local officers in rejecting the application of Todd Knepple to file for the NE. $\frac{1}{4}$ of Sec. 17, T. 24 S., R. 46 W., Lamar, Colorado, upon the ground that Knepple had exhausted his right of pre-emption by filing and perfecting entry on Osage Lands in Kansas under the act of May 28, 1880 (21 Stat., 143). It is admitted that applicant filed declaratory statement for a quarter-section of the Osage Indian trust and diminished reserve land at Garden City, Kansas, claiming said tract as a pre-emption right under the provision of the act of May 28, 1880, perfected said entry, and that certificate therefor was issued to him February 19, 1886.

January 24, 1887, Knepple offered to file declaratory statement for the NE. $\frac{1}{4}$ of Sec. 17, T. 24 S., R. 46 W., Lamar, Colorado, claiming the same as a pre-emption right under the act of September 4, 1841. The register and receiver rejected said application, for the reason above stated, from which rejection applicant appealed, upon the ground (1) That he has never made such pre-emption filing as is contemplated by section 2261 of the Revised Statutes, and (2) That Osage Indian trust and diminished reserve lands are not subject to the general pre-emption laws, and hence a filing and entry upon such lands is no bar to a subsequent entry of public land under the act of September 4, 1841.

This appeal brings directly in issue the question, whether a pre-emptor exhausts his pre-emption right by a filing on Osage trust and diminished reserve lands, and that is the sole issue in the case.

It is claimed by appellant that the ruling of the Department in the case of Woodbury, administrator, *v.* United States (5 L. D., 303), is decisive of this question. In that case the sole question decided was that the statutory oath required of a pre-emptor is not applicable to an entry under the act of May 28, 1880, the only condition prerequisite to such entries being that the entryman shall be an actual settler, with the qualifications of a pre-emptor.

It does not follow, however, that an entry of Osage Indian lands is not the exercise of a pre-emption right, although the conditions of entry may not be governed by the general pre-emption law in all respects. It was distinctly held that an entry of Osage lands could be made only by a person having the qualification of a pre-emptor. The exercise of a right due alone to a pre-emptor is necessarily the exercise of a pre-emption right.

But appellant urges in support of this appeal that the oath required of appellant in the present application is "that he has never had the benefit of any right of pre-emption under section 2259," and that he did not exercise his "pre-emption right" in making his entry of the Osage trust lands, or claim said lands by virtue of the provision of section 2259, but that in his Osage declaratory statement "he declared his intention to claim said tract as a *pre-emption right* under the provisions of the act of May 28, 1880, for the disposal of the Osage Indian lands." This statement of appellant seems to be a conclusive argument against the further exercise of the right of pre-emption.

What is the right of pre-emption under section 2259 of the Revised Statutes? It is a right based upon settlement, inhabitancy, and cultivation, to purchase by legal subdivisions any number of acres not to exceed one hundred and sixty, upon subscribing to the statutory oath required in section 2262 of the Revised Statutes.

The act of May 28, 1880, provides that the Osage Indian trust and diminished reserve lands shall be "subject to disposal to *actual settlers* only *having the qualifications of pre-emptors.*"

A pre-emption right in its general sense is defined to be "the right or privilege of purchasing before others." As applied to the act of May 28, 1880, it is the exclusive right of purchasing in the first instance, because these lands can not be offered for sale in any other manner until the pre-emption right has been exercised by some one and default in payment be made therefor.

It being shown that this is a pre-emption right, the question arises can this right be again exercised in the purchase of either Osage lands or other lands under the general pre-emption laws?

It can not be questioned that the spirit and policy of the general land law is that no person shall have more than one preference right of purchase of any part of the public domain, and that such right is exhausted when exercised in the purchase of any legal subdivision allowed by law under the general pre-emption law, or under the act of May 28, 1880;

providing for the disposition of the Osage Indian trust and diminished reserve lands.

Under the act of July 15, 1870 (16 Stat., 362) it was not contemplated that settlement upon these lands should be governed in all respects by the general pre-emption laws (Foster v. Brost, 11 Kan., 350) but the act of May 9, 1872, declared that these lands should be subject to disposal to actual settlers only in accordance with the general principles of the pre-emption laws, under the direction of the Commissioner of the General Land Office, provided, however, "that the restriction of the pre-emption laws relating to previous enjoyment of the pre-emption right, to removal from one's own land in the same State, or the ownership of over three hundred and twenty acres, shall not apply to any settler *actually residing on his or her claim at the date of the passage of this act.*" (17 Stat., 90).

It would seem from this that, while Congress did not intend by the act of July 15, 1870, to apply to these entries the general principles of the pre-emption law, it did not dispense with the restriction of the pre-emption law as to the exercise of more than one pre-emption right, otherwise there would have been no necessity for the provision in the act of May 9, 1872, as to the settlers actually residing on their claims at the date of the passage of that act.

This provision applying only to settlers, who were actually residing on their claims on the 9th day of May, 1872, it follows that all entries based upon settlement made after said date were governed in *all respects* by the general principles of the pre-emption law, until the act of May 28, 1880, which provided that actual settlers under existing laws (any failure to comply with such existing laws notwithstanding) shall be allowed sixty days in which to make proof of and payment for their claims in the manner therein provided, and section two of said act provides that the remaining unappropriated lands shall be disposed of to *actual settlers* only having the *qualification of pre-emptors*. To determine the qualification of a pre-emptor, it is necessary to look to the general pre-emption law. Under this law no one is a qualified pre-emptor who has once exercised the right of pre-emption.

Appellant was only authorized to make entry of Osage trust and diminished reserve lands by virtue of his right as a pre-emptor, and having exercised that right or privilege in the purchase of Osage lands, it was exhausted as a pre-emption right to all other lands.

Your decision is therefore affirmed.

TOWNSHIP PLAT—FINAL PROOF.

ELISHA B. CRAVENS.

The right to submit final proof recognized, pending suspension of the township plat; it appearing that the survey is substantially correct, that the lines of the section involved will not be changed, and that the settler may not be able to make final proof in the event of further delay.

Acting Secretary Muldrow to Commissioner Sparks, March 31, 1887.

Elisha B. Cravens, by his attorney, has filed an application for certiorari under rules 83 and 84 of practice.

In this application it is alleged that Cravens settled upon lots 2, 3, 4, and 5, in Sec. 9, T. 6, R. 89, Glenwood Springs, Colorado, on the 12th of May, 1884, the plat of said township having been filed prior to that date, and has since resided there continuously, cultivating and improving said tracts, his improvements thereon being valued at about \$13,000; that on the 28th of August, 1885, he offered final proof, and tendered payment for the land described under the pre-emption law, which proof and payment were refused, because the township plat had been suspended, for the reason that the survey of the township was erroneous. It is further alleged that since September, 1885, applicant has often requested you to remove said order of suspension and allow him to submit his final proof, and, if necessary, to have an examination of said surveys made in the field, in order to ascertain from what cause the apparent error therein arose; that some time in June, 1886, an order was made by you for the surveyor-general of Colorado to have said survey examined, and in pursuance thereof said surveyor-general selected a skillful examiner and surveyor, who went upon the ground and thoroughly examined said township and other townships complained of, embraced in the order of suspension before mentioned; that when said examiner reported to your office you determined to adopt the survey of township 6, and held that it was to the interest of the government as well as the people that a fractional township should be thrown in somewhere to the east of said survey, and that the survey should be allowed to remain as it is; that said examiner's report was to the effect that the interior corners of the township were substantially correct in location, and that the error in the matter was not in said survey, but in the one to which this one was attached having been made at a point to the east in the mountains; that it was recommended to you by the surveying division of the department that the order of suspension be removed from township 6, except as to the southern and western tiers of sections, inasmuch as those lines had not been finally examined; that finally, by letter dated November 18, 1886, you declined to remove said order of suspension, either in whole or in part, until another examination of said survey could be made; and that by letter dated November 30, 1886, you declined to allow an appeal from said decision. It is further urged as a reason why said order of

suspension should be removed, so far as this claim is concerned, that the witnesses by whom claimant expects to establish his compliance with the law are of a migratory character, and are liable to leave that part of the country, and thus render it difficult, if not impossible, for him to make final proof on his said claim.

It being alleged that you have agreed to accept the survey of said township in the main as correct, and that in any event the lines of said section 9 would not be changed, and the further allegations before mentioned as to the possible difficulty claimant may have in making proof if the same be delayed any length of time, appear to establish a *prima facie* case for the relief prayed for.

Said application is therefore granted, and you will please certify the record of the case to this department, and in the mean time suspend further action thereon until further advised.

INDIAN LANDS—MILLE LAC RESERVATION.

ROBERT LOWE.

By the act of July 4, 1884, the lands acquired from the White Oak Point and Mille Lac bands of Chippewa Indians, by treaty of March 20, 1865, were withheld from disposal in accordance with the provisions of said treaty.

The words "on the White Earth reservation" in said act are repugnant to its otherwise clearly expressed intent and meaning and must yield thereto in construction.

Acting Secretary Muldrow to Commissioner Sparks, April 4, 1887.

You refused to issue patent upon soldier's additional homestead entry, No. 2579, for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 20, "T. 42 N., R. 25 W.," and the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 18, "T. 42 N., R. 25 W., Taylor's Falls land district, Minnesota, upon the ground that Congress, by act of July 4, 1884, provided, "that the lands acquired from the White Oak Point and Mille Lac bands of Chippewa Indians, on the White Earth reservation, in Minnesota, by treaty proclaimed March 20, 1865, shall not be patented or disposed of in any manner until further legislation by Congress;" and that the land in question seems to be included within the meaning and intent of the clause above quoted."

Appellant claims that "T. 42 N., R. 25 W.," is not embraced in the White Earth reservation, and hence said act has no application to the land covered by this entry.

By treaty of February 22, 1855 (10 Stat., 1165), there was reserved and set apart a quantity of land for the permanent home of the Mississippi bands of the Chippewa Indians, the land so reserved being set apart in separate tracts and reservations, and known as Mille Lac, Rabbit Lake, Gull Lake, Pokagomin Lake, Sandy Lake, and Rice Lake, respectively.

The first reservation embraced the following fractional townships, viz: "42 N., R. 25 W.," 42 N., R. 26 W., 42 and 43 N., R. 27 W., and also the three islands in the southern part of Mille Lac.

Then followed the description of boundaries of the other reservations, none of which extended to or embraced any part of the land afterwards known as the White Earth reservation.

The Mille Lacs are a band of the Chippewas, and the reservation first named was the reservation set apart for this band of Indians, and was the only reservation set apart for this band by that treaty. This fact admits of no question whatever.

By the same treaty reservations were also created for the Pillager and Lake Winnibigoshish (White Oak Point) bands of Chippewas, but none of these reservations embraced any part of the territory now known as the White Earth reservation.

Article 1 of the treaty proclaimed "March 20, 1865," provided that, "The reservations known as Gull Lake, *Mille Lac*, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as *described in the second clause of the second article of the treaty with the Chippewas of the 22d day of February, 1855*, are hereby ceded to the United States."

In consideration of said cession, the United States set apart other reservations for the future home of said Indians, but no part of said reservations embraced any of the territory afterwards known as the White Earth reservation.

The 12th article of said treaty provides, "That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

There is no reference in this treaty to any lands "acquired from the White Oak Point and Mille Lac bands of Chippewa Indians on the White Earth reservation," but on the contrary it appears that the country known as the White Earth reservation was not embraced in the territory ceded by the Chippewas by the treaty of March 20, 1865, and was not created as a reservation until the treaty proclaimed April 18, 1867, more than two years thereafter." By article 2 of that treaty, a tract of land, embracing a square of thirty-six townships, including White Earth Lake and Rice Lake, and known as White Earth reservation, was set apart as a reservation for said Indians, and is still held in reservation for that purpose.

It is conceded by appellant that the White Earth reservation had its inception in the treaty of April 13, 1867, and that no treaty between the United States and the Mille Lac and White Oak Point bands of Chippewas was proclaimed March 20, 1865, whereby these bands of Indians ceded a single acre of *this land* as part of the White Earth reservation. This concession is conclusive that the act of July 4, 1884, withholding from disposal the lands acquired from the White Oak Point and Mille Lac bands of Chippewas, by treaty of March 20, 1865, did not embrace any lands on the White Earth reservation, for the reason that no such lands were ceded by said treaty.

It is a cardinal rule of construction that statutes must be interpreted according to the intent and meaning and not always according to the letter.

Under this rule, if words or phrases employed in a statute are repugnant to other words and phrases that clearly express the intent and meaning of the statute, they should be rejected as mere surplusage.

The act of July 4, 1884, refers to the lands acquired from the White Oak Point and Mille Lac bands of Chippewa Indians by the treaty of March 20, 1865. A reference to that treaty shows that no lands lying within the territory known as the White Earth reservation was acquired by the United States from said bands of Indians, but that among the reservations thereby ceded was "Mille Lac," "described in the second clause of the second article of the treaty with the Chippewas of February 22, 1855."

A reference to the treaty of February 22, 1855, shows that the "Mille Lac" reservation ceded to the United States by the treaty of March 20, 1865, is described as follows: "fractional townships, viz: 42 N., R. 25 W., 42 N., R. 26 W., 42 and 43 N., R. 27 W., and also the three islands in the southern part of Mille Lac."

This is a direct and positive description of the lands referred to by the act of July 4, 1884, and the words, "on the White Earth reservation," being clearly repugnant to the descriptive words above referred to, should yield to words that will best carry into effect the intention of the legislature.

Considering further that the White Earth reservation was not created until April 18, 1867, and that it has not been ceded to the United States, but is still a reservation for said Indians, that the 12th article of the treaty of 1865—by which the Mille Lac Indians ceded the lands embraced in the "Mille Lac" reservation—provided that said Indians should not be compelled to remove from said ceded lands, so long as they did not in any manner interfere with the person or property of the whites, clearly indicates that it was the intention of Congress to protect these Indians in their right of occupancy of that territory, as stipulated by the 12th article of the treaty aforesaid.

Your decision is affirmed.

SCHOOL LAND—STATE SELECTION.

STATE OF CALIFORNIA *v.* SMITH.

The State is not authorized to select double minimum land in lieu of lost school sections.

Acting Secretary Muldrow to Commissioner Sparks, April 4, 1887.

Edward M. Smith made application to purchase the NW. $\frac{1}{4}$ of Sec. 20, T. 1 N., R. 1 E., S. B. M., Los Angeles land district, California, under act of June 3, 1878, which application was rejected by the local officers, for

the reason that said land prior to said application had been selected by the State of California as indemnity in lieu of lost school sections sixteen and thirty-six, from which decision Smith appealed. You reversed said decision, upon the ground that said selection by the State of California was invalid, for the reason (1) That the lands selected are double minimum and such lands can not be selected by the State in lieu of lost school sections; and (2) Because the selection is based upon alleged deficiencies that do not exist. From this decision the State appealed.

The deficiencies alleged are as follows:

Part of NE. $\frac{1}{4}$ of Sec. 36, T. 6 S., R. 8 W.....	80
Part of Sec. 36, T. 15 S., R. 6 W.....	160
SW. $\frac{1}{4}$ of Sec. 16, T. 10 S., R. 4 W.....	40
Fractional T. 6 S., R. 24 E. (All S. B. M.).....	40
Total	320

You say that the records of your office show that there is no such township as 15 S., R. "6 W.," S. B. M., and that fractional township 6 south has been satisfied. Therefore the only deficiency shown as a basis for the selection of the said NW. $\frac{1}{4}$ of section 20, is part of the NE. $\frac{1}{4}$ of Sec. 36, T. 6 S., R. 8 W.—eighty acres, and part of the SW. $\frac{1}{4}$ of Sec. 16, T. 10 S., R. 4 W.—forty acres; making a total of one hundred and twenty acres.

The selection of one hundred and sixty acres for a deficiency of one hundred and twenty acres being unauthorized, the State can not substitute other lands actually lost, or amend by adding other lands to the basis of indemnity, and thus preserve her selection so as to defeat the right of an applicant to purchase said land made prior to substitution, or amendment, because such substitution or amendment would be virtually a new selection, taking effect only from its date. *California v. Haile*, (1 C. L. L., 324); *Selby v. California*, (3 C. L. O., 4); *Nebraska v. Dorrington*, (2 C. L. L., 647).

The principal ground of error alleged by the State is, in holding "that lands double minimum in price can not be selected in lieu of lands single minimum in price."

In connection with this alleged error, counsel insist that your office erred in neglecting to state in said decision that in this case the State selected one acre of double minimum as indemnity for two acres of single minimum land lost.

If the eighty acres in township 6, and the forty acres in township 10, are the only lands of the alleged deficiency (upon which this selection was based), for which the State is entitled to indemnity, as shown by the decision of your office, their position is not tenable. Counsel do not controvert the statement that there is no such township as 15 S., R. 6 W., S. B. M., and that the deficiency in fractional township 6 south has been satisfied, but merely allege that your office erred in not giving them an opportunity to make good the consideration for the land

selected by surrendering their claim, on account of additional school lands lost to the State, or to elect what portion of the land selected they will retain in satisfaction of that part of the indemnity to which the State is entitled.

But we may assume in the decision of this case that the intention of the State was to select one acre of double minimum for two acres of single minimum.

The seventh section of the act of March 3, 1853 (10 Stat., 244), provides "that where any settlement by the erection of a dwelling house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same *shall be surveyed*, or where such sections may be reserved for public uses, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved 20th May, 1826." The act of July 23, 1866 (14 Stat., 210, 6th Sec.), construed this grant as giving to the State of California the right to select indemnity for lost sixteenth and thirty-sixth sections, covered by grants made under Spanish and Mexican authority. Both acts refer to and adopt the terms and methods of selection prescribed by the act of May 20, 1826 (4 Stat., 179). It is unnecessary to refer to these acts further than to show for what lost sections the State is entitled to indemnity. In determining what lands may be selected as indemnity, the act of May 20, 1820, and of February 26, 1859 (11 Stat., 385), control as to the State of California, as well as to all other States.

The act of May 20, 1826, merely provided for the appropriation of land for the use of schools in townships and fractional townships, where no land had been theretofore appropriated, and providing for the adjustment of quantity where the township is fractional.

The act of February 26, 1859 (R. S., Sec. 2275), under which indemnity school selections have since been made, provided that—

Where settlements with a view to pre-emption have been made before the survey of lands in the field, which are found to have been made on sections sixteen and thirty-six, those sections shall be subject to the pre-emption claim of such settlers, and if they or either of them have been or shall be reserved, or pledged for the use of schools or colleges, in which the lands lie, other lands of *like quantity* are appropriated in lieu of such as may be patented to pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. *Provided*: That the lands by this section appropriated shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May 20, 1826.

This plan of adjustment provided by that act is incorporated in the Revised Statutes as section 2276, and is as follows:

The lands appropriated by the preceding section shall be selected within the same land district, in accordance with the following princi-

ples of adjustment, to wit: For each township or fractional township containing a greater quantity of land than three quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one half and not more than three quarters of a township, three quarters of a section, etc.

At the date of the grant to the State of California all lands in that State were single minimum lands, and the State of California, by providing for the sale of these lands at \$1.25 per acre, construed the grant to be a grant of single minimum lands, which construction has been acquiesced in by the Department.

Considering that this is a grant of single minimum lands, the question then arises, what lands is the State entitled to select in lieu of lost school sections?

The act authorizing the selection of lieu lands provides, that for the lands lost by reason of any of the conditions named in the act, other lands of *like quantity* shall be selected. Now, if the State is entitled to select lands of like quantity for the lands lost, it follows that she is entitled to select one hundred and sixty acres for every one hundred and sixty acres lost, and the State cannot be restricted to a less quantity.

This question as to the authority of the State to select a less quantity of land as indemnity for a greater quantity lost, is presented in the report of the surveyor-general of California, of August 1, 1882, to the governor, quoted in the brief of counsel, which is not controverted by counsel for the State. In said report, after referring to the preparation of maps showing the railroad reservations, he says:

This became necessary, not as a matter of general information, but because the Commissioner of the General Land Office has decided that when the State selects indemnity lands within such reserved limits, the land must be regarded as double minimum in price, and the State can not select within the reserved limits, unless it has lost other lands equivalent in price, without agreeing to surrender two acres for one. This was done in some cases before I came into office, but without authority, for the surveyor-general is not allowed to charge more than \$1.25 per acre for State land, while to surrender two acres for one would occasion a loss to the school fund of \$1.25 per acre in all such cases, unless applicants would voluntarily pay \$2.50 per acre.

The act of June 22, 1874 (18 Stat., 202), appropriating lands for the support of schools in certain fractional townships in the State of Missouri, according to the provisions of the act of May 20, 1826, by the second section provides:

That the lands to which said fractional townships are entitled as aforesaid shall be selected by the Commissioner of the General Land Office out of any unappropriated public land within the State of Missouri, subject to sale or location *at one dollar and twenty-five cents an acre.*

This act is a construction of the act of May 20, 1826, as to the character of lands intended to be granted to the State as indemnity for

lost school sections, and as the act of March 3, 1853, and the act of July 23, 1866, granting sections sixteen and thirty-six to the State of California, provide that indemnity for lost sections shall be made in accordance with the act of May 20, 1826, it would seem to apply as well to the State of California, so far as to declare that indemnity lands selected under the act of May 20, 1826, should be lands subject to sale or location at \$1.25 per acre.

The tract selected lies within the limits of the Southern Pacific Railroad Company, and is embraced in the sections referred to in the act of March 6, 1868 (15 Stat., 39), restoring lands to market along the line of the Pacific railroads and branches, which provides that the even numbered sections along the route of the several roads shall be rated at \$2.50 per acre and subject only to entry under the pre-emption and homestead laws.

Mr. Secretary Cox, by decision of July 5, 1870 (12 L. & R., 223), on application of the State of Nebraska, under the internal improvement grant of September 4, 1841 (5 Stat., 453), refused to allow the State to select even numbered sections within the limits of the Burlington & Missouri River Railroad, upon the ground that under the act of March 6, 1868, such sections were rated at \$2.50 per acre, and by that act, which was in force when most of the lands were selected, said sections were subject to entry only under the homestead and pre-emption laws, and that the grant to the State of September 4, 1841, was made before there were any double minimum lands, and hence could not include such lands.

While lands within the limits of a railroad grant reserved from the operation of the grant to the road are not strictly speaking lands held in reservation, or appropriated public lands, they are in a certain sense lands reserved to the United States for disposition under the general settlement laws; and this applies to all such lands whether so reserved by the act of March 6, 1868, or by the various grants to railroads, in which such reservations are made.

Acting Commissioner Curtis, in his decision of August 24, 1875, (2 C. L. O., 86,) allowed the State of California "to select *outside the limits of the roads* named in the act of March 6, 1868, as indemnity for lost sections sixteen and thirty-six, other lands *equivalent in price and quantity*, and when lands are selected, the minimum price of which is \$2.50 per acre, each acre so selected shall be taken by the State in satisfaction of two acres the minimum price of which is \$1.25 per acre."

This conclusion seems to have been arrived at upon the theory that this portion of the public domain is not made exceptional in character, "save in the purpose of compelling it to make double return in money, if sold, or stand for double quantity when demanded in satisfaction of grants of \$1.25, public or private."

This is the only decision I have been able to find in favor of the right of the State to select double minimum for single minimum lands, and while it restricted the State to lands outside the limits of the roads named in the act of March 6, 1868, the reasoning would extend the right to all such lands. Referring to the opinion of Secretary Cox, above quoted, he says :

I feel constrained to hold that the even sections within the limits of the railroads enumerated in said act of March 6, 1868, are subject only to be taken under the pre-emption and homestead laws, unless where otherwise specially provided.

I fail however to see wherein he shows that other provision has been made in favor of State selections, except by the act of June 8, 1868 (15 Stat., 67), amended by act of March 3, 1871 (16 Stat., 581). In this he says :

The disposition of Congress to depart from the theory deduced from said act of March 6, 1868, in California, is indicated by the 4th section of the act of June 8, 1868, entitled "An act to further provide for giving effect to the various grants of public lands to the State of Nevada," whereby each acre so selected was to be taken in satisfaction of *two acres of minimum land* specified in the agricultural college act of July 2, 1862. This act of June 8, 1868, was amended by act of March 3, 1871, whereby the State of California was allowed to locate her agricultural college grant on double minimum land, but was required to pay \$1.25 per acre in addition, on patent.

While it is clear that by the above act, Congress extended to the States of Nevada and California the right to select under the agricultural grant one acre of double minimum land for two acres of single minimum, yet the fact that Congress found it necessary to provide in that act for the selection of double minimum lands, is to my mind conclusive that in the absence of express provision therefor, it was not intended that such lands should be selected in lieu of lost school sections.

In the matter of school sections, made by the State of Florida, Secretary Teller held, "such selections can not be made of double minimum lands within railroad grants, where the lands lost were minimum price." (10 C. L. O., 110).

Considering the object and character of the grant and of the various enactments, I am of the opinion that the term "lands of like quantity," refers to the character and quantity of the lands lost, and that the State is not entitled to select double minimum lands in lieu of single minimum lands lost in place.

Your decision is affirmed.

RAILROAD GRANT—ACT OF FORFEITURE.

OREGON CENTRAL R. R. Co.

The grant made by the act of May 4, 1870, for the construction of a railroad from Portland to Astoria, and from a point of junction near Forest Grove to McMinnville in the State of Oregon, was in effect a grant for the construction of two roads.

The words of limitation in the act of forfeiture, approved January 31, 1885, save to the grant the full complement of lands granted for every mile of road actually constructed.

Said act of forfeiture will be properly executed by adjusting the limits of the road between Portland and Forest Grove separately, and then of the road between the latter point and McMinnville.

Under such adjustment the lands lying within the quadrant formed by the limit lines northwest of Forest Grove must be restored to the public domain.

Secretary Lamar to Commissioner Sparks, April 5, 1887.

An act of Congress approved May 4, 1870, provides as follows :

That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to, and not more than twenty-five miles from the track of said road to make up such deficiency.

The second section provided :

And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with said located sections of road to be segregated from the public lands ;

Section three provides :

That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him ; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections. (16 Stat., 94.)

Said railroad was constructed from Portland, west to Forest Grove, and thence south to McMinnville, and maps of the constructed portion

were accepted by the Secretary of the Interior. Maps of definite location of the line from Forest Grove northwesterly to Astoria were also filed, and withdrawals made thereon, but the road was not constructed between these points.

By act of Congress approved January 31, 1885, (23 Stat., 296), it was provided:

"That so much of the lands granted by an act of Congress entitled 'An act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May 4, 1870, as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be, and the same are hereby, declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States as though said grant had never been made."

On July 8, 1885, instructions were issued to the local officers at Oregon City, for their guidance under said forfeiting act (4 L. D., 15), and therewith was enclosed a diagram showing the limits of the forfeited lands, and of that part of the grant not affected by the forfeiture act. Said instructions in as far as they relate to the diagram are as follows: "Construing the whole act, it appears to me that Congress intended to reserve from forfeiture the lands within granted limits along the whole of the constructed portion of the road. For the present, therefore, the restoration of lands under the act of January 31, 1885, will be limited to the lines shown on the diagram, which is prepared in accordance with the foregoing view."

The diagram shows that the line of the road extends from Portland west to Forest Grove, and at that point turns almost at a right angle, and runs south to McMinnville. From the town of Forest Grove, as located on the plat of public surveys, two lines are drawn, one due north, the other due west, both terminating at the twenty mile limits. The granted lands lying within the quadrant formed by these lines and the twenty mile limits are designated on the diagram as "forfeited." The diagram also shows the forfeited lands on the line from Forest Grove to Astoria.

Said instructions further call the attention of the local officers "to the provisions of the act protecting the rights of actual settlers, and allowing such as are not entitled to make entry under existing laws to purchase, within one year, not to exceed one hundred and sixty acres at one dollar and twenty-five cents per acre." "The persons who, under the provisions of the second section of the foregoing act have a preference right of entry of restored lands are those who, on January 31, 1885, were actual settlers in good faith on the lands claimed by them, and are qualified to make the entry applied for. The preference right may be exercised within six months from date of promulgation of instructions."

On December 19, 1885, there was filed in this Department a petition of R. Koehler, receiver of the Oregon and California Railway Company, assignee of said Oregon Central Railroad Company, praying that said instructions, in as far as they applied to granted lands in said quadrant, be revoked. Said petition was referred to your office for examination and report.

By letter of May 3, 1886, your office submitted its report, recommending "that the restoration remain in force as per instructions of July 3, 1885," and transmitted a second diagram marked "B," "showing the accurate limits of the grant," to be substituted for the first diagram, marked "A."

Your letter says:

The diagram (copy enclosed, marked "A") was prepared, generally, in accordance with the system of measurement recently adopted by this office in establishing the limits of railroad grants, but the lateral limits were not measured for each subdivision in detail. An *accurate* measurement is given in diagram marked 'B.' It will be observed by reference to the diagram that the direct course of the road between Portland and the intermediate point mentioned in the act near Forest Grove, is due east and west, or nearly so, that at the latter point the road makes an abrupt turn, and between it and the terminus near McMinnville the direct course is practically north and south. The limits of the grant are determined by measurement from the actual line of the road, but at right angles to the direct line or course between the termini, or from a terminus to some intermediate point named in the granting act, in the present case the point near Forest Grove. Proceeding upon this system, which is believed by this office to be the only true means of accurately determining the limits of the grant, it was found that the quadrant north-west of Forest Grove is not opposite and coterminous to any portion of the road as constructed, but is entirely outside of the grant as it now stands, and the restoration was made accordingly.

It thus appears that the adjustment of the limits by which the lands in said quadrant were eliminated from the grant was made in accordance with a system "recently adopted" by your office. That system was fully set forth by your office letter of April 30, 1886, in the case of *Scott v. Kansas Pacific Railway Company*. It was there prescribed as a basis for adjustment under such system that a line be drawn connecting the termini of the road. In the present case that requirement is departed from, and the line is drawn from one terminus to an intermediate point (near Forest Grove), and thence to the other terminus. The system of adjustment proposed in said *Scott* case was rejected by this Department on March 10, 1887, and the old system adhered to (5 L. D., 468). Said diagrams in as far as they are based on said proposed system are accordingly rejected.

The forfeiting act, however, presents the necessity of re-adjusting the limits of said grant in order to determine the lines separating the forfeited lands from those not affected by the forfeiture. It will be noticed that while the act declares that so much of the grant as is "ad-

jacent to and coterminous with the uncompleted portions of the road" is forfeited, it reserves from forfeiture that portion "embraced within the limits of said grant for the completed portions of said road."

In my opinion then these lines form two distinct roads: to wit, a road from Portland to Astoria and a road from Forest Grove to McMinnville.

As will be observed said act of May 4, 1870, provides—"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria," (and a railroad and telegraph line) "from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville," etc.

The words in parenthesis, though not expressed in the act, would seem to be necessarily implied; thus showing that two railroads were in effect provided for, to wit, a road "from Portland to Astoria," and a road "from a suitable point of junction" (therewith) "near Forest Grove to the Yamhill river, near McMinnville," etc.

This view seems irresistible in the light of the definition of the words "*point of junction*" as understood in railroad language. These words are invariably used to indicate the point where two or more railroads join, and are not used to designate a point where a part of a railroad joins another part of the identically same road. If used in this latter sense, then every railroad would have as many junctions as there are "points" between its termini.

But Webster's definition of the word "junction" would seem to be decisive of this question. In defining the term "junction" in its application to railroads, he says it means: "Specifically the place where two lines of railway meet; as Manassas Junction."

It is true that the granting act in question uses the word "railroad" and not *rail-roads*; but it is a well settled proposition that in legal parlance the singular embraces the plural and the plural the singular.

The road from Portland to Astoria was not completed, only that portion between Portland and Forest Grove was built. The grant for the portion between Forest Grove and Astoria was forfeited. The words of forfeiture are, "so much of the lands granted . . . as are adjacent to and coterminous with the uncompleted portion of said road." Had these words been unqualified in the forfeiting act, it seems clear that the line dividing the forfeited lands from those not forfeited would have been drawn through Forest Grove, at right angles to the unconstructed line at that point, and terminating at the lateral limits of the grant. This would have thrown out of the grant large tracts of land that are opposite to the constructed portions of the road. Congress therefore, in order to save to the grant lands opposite the constructed portions, qualified the above quoted words of forfeiture by adding, "and not embraced within the limits of said grant for the completed portions of said road." This clause saves to the grant the full complement of lands granted for every mile of road actually constructed. This view of the act is much strengthened when it is observed that the lands in said

quadrant lie along the uncompleted portion on both sides thereof, and could have been earned, if at all, by that line.

The provisions of the forfeiting act will therefore be fully carried out by adjusting the limits of the road between Portland and Forest Grove separately, and then of the road between the latter point and McMinnville.

The papers are herewith returned, and you will proceed, at your earliest convenience, to make the adjustment in accordance with this opinion. In doing so, you will follow the system now in use.

The petitioner herein asks that all entries allowed on said lands since the passage of the forfeiting act be canceled. Inasmuch as it does not appear from the record before me that an entry has been made of any specific tract, it seems sufficient for the present to direct that, if any entries have been allowed, such action be taken by you as will be in conformity with the decision herein. I suggest the importance of furnishing corrected diagrams to the local office as early as possible.

RAILROAD GRANT—PRE-EMPTION CLAIM.

MILLIMAN *v.* UNION PAC. RY. CO.

Prior to the act of July 14, 1870, the law fixed no limit within which a settler under the pre-emption act, on unoffered land, should make proof and payment.

The preference right of purchase, acquired by settlement, residence, and filing, constitutes the nature and substance of a pre-emption claim, and subsequent absence from the land does not necessarily defeat such claim.

A pre-emption claim, subsisting at the date of definite location, excepts the land covered thereby from the grant to the Union Pacific.

To show that under a pre-emption claim, which had attached before definite location, actual habitation had ceased prior thereto, does not establish the fact that the preference right of purchase did not then exist and except the land from the grant.

Acting Secretary Muldrow to Commissioner Sparks, April 4, 1887.

On March 6, 1883, Ruth B. Milliman made application to enter under the homestead law the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 17, T. 6 S., R. 68 W., Denver, Colorado. The application was rejected by the local officers on the grounds that the tract is within the granted limits of the Union Pacific Railway Company, Kansas Division.

The records of your office show that the land was included in pre-emption declaratory statement filed by Thomas P. Sumpter, November 2, alleging settlement May 1, 1866.

The withdrawal for said grant became effective December 25, 1866, and the map of definite location was filed May 26, 1870.

Milliman appealed from the action of the local office, alleging that the claim of Sumpter excepted the tract from the grant. By letter of May 8, 1883, your office ordered a hearing to determine the facts on which the claim of Sumpter was based.

On September 18, 1883, the day set for the hearing, the company was represented by attorney, and the applicant herein submitted the testimony of certain witnesses. An adjournment was had by consent to October 25 following, and on that day the company failed to appear, and the case was closed. The testimony showed that Sumpter was a citizen of the United States, that he settled on the tract in the spring of 1866, and maintained a continuous residence thereon until the spring of 1868, when he left; that his improvements consisted of a house, one and a half stories high, twelve acres of breaking, and thirty or forty acres fenced; that he had some cattle on the place, and raised vegetables, and sowed some acres in grain. On these facts, your office, by letter of January 23, 1884, held that the claim of Sumpter excepted the land from the withdrawal, and that he might have perfected his claim by a continued compliance with the requirements of the law, but as he abandoned the tract prior to the date when the company's rights attached by definite location, and as at that date his filing had lapsed and no other person was occupying or claiming the tract, that the right of the company thereto became absolute.

I am unable to agree wholly with that conclusion.

The grant was of land "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely located."

There can be no doubt that the claim of Sumpter "attached" to the tract. He was a qualified pre-emptor, he settled, filed, cultivated the land as required by law, and resided on it for two years. The only further question to be determined is, did the claim continue in existence until the date of definite location? If so, the company has no title to the tract. To determine this question the hearing was had.

The testimony shows that claimant did not continue to inhabit the tract after the spring of 1868. Does this constitute proof of abandonment of the claim? It is true that in contests between two settlers, the term "abandonment" is used to denote an absence from the claim for more than six months. But a different question is presented here. The grant provides that no tract shall pass to the road if a pre-emption claim has attached thereto "at the time the line of said road is definitely located." Your office says the filing of the pre-emptor had "lapsed." This is a mistake. The land in question is "unoffered." Prior to the passage of the act of July 14, 1870, the law defined no limit within which a settler under the pre-emption act, on unoffered land, should make proof and payment for the same. Said act of July 14 provided that, "all claimants of pre-emption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired: *Provided*, That where said date shall have elapsed before the passage

of this act said pre-emptors shall have one year after the passage hereof in which to make such proof and payment." (16 Stat., 279.) By this act the life of said filing was extended beyond the date of definite location, to wit, to July 14, 1871. That is, the right of the pre-emptor to make proof and payment at any time prior to said date was paramount to that of any subsequent claimant. This is the nature and substance of a pre-emption claim. It is a right of purchase, enjoyed by the pre-emptor, in preference to all others. The testimony fails to show that the settler in this case had surrendered that right of purchase, or lost it; in other words, it fails to show that the "pre-emption claim" was abandoned. To show that actual habitation ceased at a period prior to definite location is not enough. Absence does not necessarily terminate the pre-emption claim. Not even if continued to the date of definite location. It was necessary to proceed farther, and to show that the preference right of purchase—the pre-emption claim—initiated and acquired by settlement, residence, and filing had expired at definite location. In this the proof failed.

I am therefore unable to find that the pre-emption claim had terminated at date of definite location, and as it had attached, I must hold that it excepted the tract from the operation of the grant.

It thus appearing that at the date of definite location a right of pre-emption had fastened to the land, the company has nothing to do with future conditions.

Said decision is accordingly reversed.

ABANDONED MILITARY RESERVATION—FORT RANDALL.

REYNOLDS v. COLE.

An entry under the act of July 5, 1884, is not authorized without settlement prior to January 1, 1884, and continuous occupation thereafter.

Acting Secretary Muldrow to Commissioner Sparks, April 4, 1887.

On August 18, 1885, John W. Reynolds made application to enter under the homestead law Lots 2 and 3 of Sec. 6, T. 96, R. 67, and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 1, T. 96, R. 68, Yankton, Dakota. The application was rejected by the local officers because of conflict with the homestead entry of one Chester F. Cole, made one day prior thereto, covering said Lots 2 and 3, and the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section 6.

An act of Congress, approved July 5, 1884, provides:

That whenever in the opinion of the President of the United States the lands or any portion of them, included within the limits of any military reservation, heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or

so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided. (23 Stat., 103).

Said act further provides for the survey, appraisement and sale of such lands.

Provided, That any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January 1, 1884, in good faith, for the purpose of securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions.

By Executive order of July 22, 1884, that portion of the Fort Randall military reservation lying "north of the Missouri river not already confirmed to settlers under the act of Congress approved May 18, 1874," was placed under the control of this Department, under the provisions of said act of July 5.

The tracts in question lie within that part of said abandoned military reservation. Cole alleged settlement on October 1, 1882, and continuous residence from that date. Reynolds alleged settlement on July 30, 1882, and cultivation of sixteen acres each year since settlement. The conflict between said entries is as to said Lots 2 and 3. On appeal from the local office, Reynolds asked that a hearing be ordered to determine the truth of his said allegations.

Your office, by letter of December 26, 1885, affirmed the action of the local office in rejecting the application, and refused to order a hearing, as Reynolds did not claim actual residence on the tract, or "state where his improvements lie."

It is clear Reynolds' application can not be allowed as made, for the reason that it conflicts in part with the prior entry of Cole.

On appeal to the Department, he does not claim that any of his improvements are on the land covered by the entry of Cole, nor even that they are in the quarter section containing that entry. I must therefore hold that he has not furnished proper grounds for a hearing to determine his rights as against those of Cole. His improvements may be altogether in section 1. It was held in the case of L. R. Hall (5 L. D., 141) that the notice given by settlement and improvement extends only to the quarter section as defined by the public surveys within which they are located.

Nor does claimant on appeal allege that he has continued in actual occupation of the tract since settlement or since January 1, 1884, or that he is now living thereon. Said act of July 5, under which he claims, provides that any settler who was in actual occupation of any portion of any such abandoned military reservation prior to the location thereof, or settled thereon prior to January 1, 1884, in good faith and for the purpose of securing a home and of entering the same under

the general laws, and has continued in such occupation, and is entitled to make a homestead entry shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions. Entries made in accordance with these provisions upon which final proof in conformity with law and the departmental regulations, has been made, are entitled to proceed to patent. In the present case the survey was completed in 1875. I am of opinion that in order to entitle a claimant to entry under said act he must allege settlement prior to January 1, 1884, and continuous actual occupation since such settlement. Said decision is accordingly affirmed.

SURVEY—TURTLE MOUNTAIN REGION.

HEMAN C. GREEN.

The extension of the public surveys over this region should not be delayed by the indefinite Indian claim thereto.

The necessity for the survey is recognized and the former departmental action therein approved.

Acting Secretary Muldrow to Commissioner Sparks, April 4, 1887.

I have considered the matter of the survey of public lands in the Turtle Mountain region, in Dakota.

On October 4th 1882, my predecessor, Secretary Teller, wrote to the Commissioner of the General Land Office, directing him to take such steps as might be necessary to open up to settlement the lands in Dakota Territory lying north and west of Devil's Lake, which had been withheld from occupancy under the land laws by an order of Secretary Schurz dated September 6th 1880 in view of the alleged rights of certain Indians known as the Turtle Mountain band of Chippewas.

By letter of October 10, 1882 the Commissioner of the General Land Office notified the surveyor general for Dakota of this action. On January 6th 1886 the surveyor general for said Territory entered into a contract with one Heman C. Green for the survey of these lands.

January 28th 1886 you directed that all contracts for surveys of these lands, including the one with Green, "though executed in full compliance with existing regulations," be suspended indefinitely, reciting as reasons for the suspension the "present status of the Indian claim to said lands, added to the presumption that the whole question will be submitted to Congress for requisite legislation as to the regular extinguishment of the Indian title, and their proper compensation therefor.

February 27, 1886, Hon. O. S. Gifford addressed a communication to the Secretary of the Interior, enclosing a copy of Mr. Green's appeal from the action of your office in suspending his contract for surveying the lands referred to. March 1, 1886, this paper was referred to you for report, and on April 22, 1886, your report thereon was submitted,

with several enclosures, but giving no reason for suspending the surveys.

In a further communication, dated April 26, *idem*, you stated that "in view of the fact that a dispute did exist in respect to these lands, and as there were other localities in Dakota in which the demand for surveys was equally urgent, and where there was no clash of interests, it was my opinion that the small appropriation available for surveys in that Territory could be more advantageously expended in such localities than in the Turtle Mountain region. In the exercise therefore of my discretion in respect to the most available field of surveying operations I concluded not to approve the Green contract but to expend the appropriation elsewhere This question is not that of the Indian title, but is solely and alone that of the expediency of making a survey in a particular locality, when in my judgment some other locality is preferable under all the surrounding circumstances."

By letter of December 17, 1886, you informed the Department "that several townships within the said country (Turtle Mountain), surveyed under contracts approved prior to the action of this office in suspending surveys in said country, have been examined in the field and found to be correctly surveyed, and the question arises whether the plats of said townships should be filed in the United States local land office for disposal of the lands, in view of said claim of the Indians," as set forth in certain papers accompanying your said report of April 22nd, preceding, and submitted the question for departmental direction.

By letter of December 18, 1886, you were informed that the matter presented in the papers accompanying your said letter of April 22, 1886, would be considered at once, and in the meantime the plats referred to would not be filed in the local land office.

January 11, 1887, your letters of April 22, April 26, and December 17, 1886, with all the accompanying papers, were referred to the Commissioner of Indian Affairs "for an expression of his views as to the title of the Indians in question to the lands involved." A copy of his report, in response to this reference is herewith transmitted, dated February 17, 1887.

In this report he expresses an opinion that the Territory in question is unceded Indian country, and that the Turtle Mountain Band of Chippewas have some claim thereto, but thinks their claim should not be a bar to its further settlement and development, and suggests, in view of all the facts and circumstances of the case, whether it would not be best to remove all restrictions as to its settlement by resuming survey, and permitting entry of the lands, leaving the claim of the Indians to be settled by Congress.

In the letter of Secretary Teller of October 4, 1882, before referred to, he says:

I am of the opinion that the claim is not well founded, yet if it should appear on a careful examination of the facts, that such a claim does ex-

ist, it will be the duty of the government to make proper compensation to the Indians. I do not think nearly 10,000,000 acres of valuable land on which a great number of settlers are now located . . . should be withheld from the operation of the homestead and pre-emption laws, because a question has been raised whether the small band of Indians (not exceeding three hundred) have a claim on this land or not. It is not contended by any one that the government has recognized this claim of the Indians by treaty with them, and the Indians make no use of the land except to roam over it, not cultivating, I think, any of it.

Whether these Indians have or have not any just claim to these lands is not now presented in form to be passed upon, and will not be considered here. I am persuaded, however, that under the facts set forth this alleged claim should not be allowed to stand in the way of opening these lands to settlement under the public land laws.

As this question seems to have been passed upon by my predecessor with a very full knowledge of the facts before him; as I discover nothing in the papers presented now which indicates that the action taken by him should be modified in any way; and as there seems to be good reasons why the lands should be surveyed,—that present and future settlers may acquire title thereto—you are hereby instructed that the contract with Green for this survey, if regular and in due form, will be approved, and that the surveys thereunder will proceed according to law; and to this end the order of your office of January 28, 1886, suspending said contract and the surveys under it is hereby revoked, and the surveys will be made as if the contract had never been suspended.

The plats of survey referred to in your office letter of December 17, 1886, covering six townships as therein described, will be filed in the local land office, for the proper disposal of the lands under existing laws.

PRIVATE CLAIM—SURVEY—EVIDENCE.

RANCHO BUENA VISTA.

In the location of a grant the survey must follow the decree of confirmation and act of juridical possession, and parole testimony is not admissible therefor, except where there may be an ambiguity, or it is necessary to identify in the field the boundaries described in those instruments.

In following calls, those mandatory, specific and most important must be gratified, even to the neglect or exclusion of the less preceptory and important.

Acting Secretary Muldrow to Commissioner Sparks, April 5, 1887.

I have considered the appeal by the claimants of the Rancho Buena Vista from your office decision of April 10, 1885, rejecting the survey of said rancho, and directing the surveyor-general of California to cause a new survey of the same to be made. A full history of this grant is to be found in the previous decisions of your office in relation

thereto, reported in 1 L. D., 260; 2 L. D., 366 and 370, and as the facts connected therewith are voluminous, only those essential to a proper understanding of the conclusion herein arrived at will be stated, and those as briefly as may be.

The land in question lies in San Diego County, California and was granted, on July 8, 1845, by the Mexican authorities to the Indian Felipe, and confirmed on May 16, 1854, by the board of land commissioners to Jesus Machado, assignee, which confirmation was approved by the United States district court, February 1, 1856, but no formal decree of affirmation was filed until April 15, 1879. This decree confirmed to the claimant the tract in question "to the extent of one-half of a square league of land, a little more or less, being the same land which is situated in the county of San Diego, known by the name of Buena Vista, and bounded and described as follows:

Commencing at the northwest corner of the garden of the Indian Felipe, and running east two thousand five hundred varas to the boundary line of Lorenzo Soto; thence running south two thousand five hundred varas to a small peak, where stand two rocks joined together; thence running west two thousand five hundred varas to a small red hill; thence running north two thousand five hundred varas to the place of beginning, on a hill where there is a rock; containing in all half of a square league. Reference for further description to be had to the original grant, and to the translation of the original record of juridical possession.

Reference being thus made to the original grant and the "translation" of the record of juridical possession, they become to all intents and purposes a part of the final decree.

There is nothing in the original grant to be noted, save that the petition of Felipe was for "a small piece of land . . . half a league in length and one half in breadth." The application was approved by the Committee on Public Lands to the "extent of half a square league," and the grant made by Pio Pico to Felipe for "the lot of land known as Buena Vista," "one half league square in extent, and is the same he actually occupies."

Jose R. Arguello, the alcalde, thus describes the delivery of juridical possession:

As we stood at one of the boundaries of the garden of the Indian Felipe, the line was drawn east and there were measured and counted two thousand five hundred varas, which terminated at the boundary of Don Lorenzo Soto, where the party interested was ordered to place his land mark. From this place the line was drawn in a south course, there were measured and counted two thousand five hundred varas, which ended at a small peak where stand two rocks joined together. Here the party interested was ordered to place his land mark. From this point the line was drawn, course west, and there were measured and counted two thousand five hundred varas, which ended at a small red hill, where the party interested was ordered to place his land mark. From this point the line was drawn, course north; there were measured and counted two thousand five hundred varas which ended upon a hill,

where stands a large rock, and the party in interest was ordered to place his land mark. Here the party in interest was informed that he was now in secure and peaceable possession to the end; that he might enjoy it freely and unreservedly, the proceeding being considered as ended.

Several surveys of the rancho were made from time to time, but none of them being satisfactory to your office they were rejected, for reasons stated. No appeal having been taken from these rejections, it is not necessary to go into any discussion in regard to this former action. On May 27, 1884, the surveyor general of California was instructed to cause a new survey of the rancho to be made, conforming, as nearly as practicable, to the boundaries set forth in the decree, being the same described in the act of juridical possession. In your said letter you stated that the northwest corner should be adopted as located in the Stroebel survey, "on a hill where there is a big rock"; and the southeast corner as described in the Hays survey and also located in that of Minto, "on the top of a red hill."

On June 13, 1884, the surveyor general enclosed map and field notes of Minto's survey, and also a diagram marked R, showing the lines of the previous surveys, and also that which would be made if the directions of the Commissioner were followed.

On July 1, 1884, your office replied, stating that it appeared, from Minto's field notes and diagram R, that the location of the northwest corner by Stroebel was erroneous, and the previous instructions in relation to its adoption were modified; and it was said that certain designated points on said diagram were probably the proper locations for the northwest, southwest, and northeast corners. But the surveyor general was instructed in executing the survey to be always "governed by the boundaries designated in the decree of confirmation, adopting the suggestions herein, as far as they are found to correctly indicate the corner boundaries on the ground."

In pursuance of these instructions, survey of the premises was made in September, 1884, by Deputy-Surveyor Wheeler, approved and forwarded October 25, 1884, by the surveyor-general, together with field and descriptive notes, the protests of certain settlers against the approval of said survey, and other papers relating thereto.

On April 10, 1885, your office rejected said survey, and a new one was ordered; and it is on the appeal of the grant claimants from this action that the case is now before me.

Wheeler, the deputy who made this survey, states that he is familiar with the country and people in the neighborhood of the grant, and is also familiar with the Spanish language; that prior to making said survey he found an old native Californian, Sylvestre Marron by name, who was the only living witness of the act of juridical possession, having acted as chainman on that occasion; that with this person a careful and thorough examination of the country was made, and he showed to the deputy all the old corners and lines exactly as shown in the field notes

and plat of the latter. The affidavit of Marron in Spanish, and a translation thereof, is also transmitted; and his character as a man of intelligence and veracity is vouched for by the deputy.

* * * * *

Wheeler acted upon the statements of Marron and located his survey in accordance therewith, so far as they went, and says in his report that he found the corners without difficulty, and the whole survey in his opinion corresponds with the juridical possession as actually delivered. The area embraced in his survey is 4,269.60 acres, or nearly an entire square league.

If the location of the grant was to be determined alone by parole testimony, that of Marron would be of great value, if not contradicted or impeached. But in this survey we are not authorized to go outside of the decree of confirmation and act of juridical possession, except where there may be an ambiguity, or it is necessary to identify in the field the boundaries described in those instruments.

Neither the original petition of Felipe, nor the grant to him describes the land by boundaries. It is spoken of as "half a league," "occupied with his stock since 1836," "covered by his muralles (enclosures) garden and house," but no further description is given until the completion of the act of juridical possession, wherein the boundaries are for the first time stated. The board of land commissioners and the United States district court confirmed the grant by described boundaries. So that upon confirmation, if not so before, the grant became one of the land contained within certain specified boundaries, containing by estimation "half a square league"; and it must be surveyed by boundaries and not quantity alone.

The act of juridical possession seemingly describes these boundaries with much precision and definiteness; but, like nearly all kindred proceedings of the Mexican authorities, on a careful examination, it is discovered that there is an absolute want of precision where it is most needed. In fact, the boundaries as located in the act of juridical possession have no definite beginning nor ending. It says, "as we stood at one of the boundaries of the garden of the Indian Felipe, the line was drawn east," etc. From this statement it is impossible to learn which one of the boundaries of the garden was the place of beginning, from which the line was run east to the land of Lorenzo Soto. So that, if this was all the record information, it would present such a case of ambiguity as to make it necessary to go into parole proof to find the initial point; and the testimony of Marron ought to throw light on the subject. But where the act of juridical possession is ambiguous, in this respect, the decree of confirmation is clear and unambiguous; for it confirms the grant as follows: "Commencing at the *northwest* corner of the garden of the Indian Felipe and running east," etc. Thus, then, we have the place of beginning established by the decree as at the northwest corner of the garden and any survey which does not adopt that point as the place of beginning must be rejected. There does not seem

to be any difficulty in finding the garden, as it is located at about the same place in all of the plats of surveys heretofore made. But should there be difficulty in so exactly locating its lines as to determine with reasonable accuracy the northwest corner thereof, parole testimony on this point could be taken.

The act of juridical possession is also defective in not showing that the line of measurement or survey was closed and ended at the place of beginning. In describing the fourth or last line, it says, "the line was drawn, course north, there were measured and counted two thousand five hundred varas, which ended upon a hill where stands a large rock." Thus, the place of beginning is described as "at *one* of the boundaries of the garden," and the place of ending as "upon a hill where stands a large rock." As the place of ending in such a survey should be at the place of beginning, the presumption would be that the "hill where stands a large rock" was the point "at *one* of the boundaries of the garden" at which the survey begun; but the language is not clear or free from ambiguity upon this point. In fact, Marron says, in his affidavit, that the juridical survey was commenced at a rock, which he showed Wheeler, at the head of the garden, and that the line was then run west instead of east "to a large rock on a hill," and that in reality no line was ever run to the east from the head of the garden, nor was any eastern line, north and south, ever run or the survey closed.

But we are not left in doubt on the point of the continuity of the lines, for the decree of confirmation again comes to our relief and describes the fourth and last line as "running north two thousand five hundred varas to the place of beginning, on a hill where there is a rock." About this language there can be no mistake.

Thus all ambiguity as to the place of the beginning and ending of the lines or boundaries is removed, and parole testimony is not admissible in this respect. The place of beginning is established by the decree with almost mathematical certainty at the northwest corner of the garden, and there the survey must begin and end. As a matter of course unless the place of beginning is established no survey can be made; and about the place in this case I do not think there can be any difficulty. In all of the surveys it is stated that the lines of the old garden are plainly discernible, and its location cannot therefore be difficult of ascertainment. In fact, there seems to be no dispute about it.

In following calls, those mandatory, specific and most important must be gratified, even to the neglect or exclusion of the less peremptory, specific or important. In this case the important and mandatory call in the fourth and last course is "to the place of beginning"; which is judicially determined to be at the northwest corner of the garden, and to that place of beginning the last line must go, even to the neglect, if necessary, of the subordinate, less important and specific call "for a hill where there is a rock." But even this may not be necessary, for Marron says the juridical survey was "commenced at a rock at the head of the garden."

In the survey under consideration the place of beginning was not at the northwest corner of the garden, but a long distance west thereof, as located on Wheeler's plat. In doing this Wheeler follows the statements of Marron and adopts as the place of beginning what the latter pointed out as the northwest corner of the juridical survey and which Wheeler also adopts as his northwest corner. In this there was manifest error. For, as I have shown, there is no ambiguity in the language of the decree of confirmation, as to the place of beginning, to justify the admission of testimony to explain it; and besides the testimony of Marron does not explain, but flatly contradicts, the official "translation" of the act of juridical possession, and also the decree of confirmation, by seeking to establish another place of beginning and ending, one mile at least westward from the place plainly described in the decree.

This fatal defect in Wheeler's survey is sufficient to require its rejection, and therefore I affirm your judgment in rejecting the same and in ordering a new survey of the grant.

As at present advised, the location by Wheeler of the northeast, southeast and southwest corners would appear to be approximately correct, inasmuch as they are reported as established at points appearing to answer in description those recited in the decree; but I prefer not to decide definitely as to these locations at this time. Since the case has been pending here on appeal, several protests and affidavits have been filed by parties claiming to have adverse interests, and who assert that the survey of Wheeler is grossly incorrect, was made entirely in accord with the wishes of the grant claimants, and that the affidavit of Marron was manufactured to fit the case. In fact, it is asserted that since the making of said affidavit, Marron has admitted to more than one witness that he was not present at the juridical survey, but at that made by Hays in 1858. And these protestants assert that the grant has been unduly amplified in all directions by the different surveys, and especially the last, and that the true boundaries of the grant have never been correctly located.

Inasmuch as, in view of the above assertions, there may be some doubt as to the proper location of the other corners heretofore mentioned, the description of which in the decree might be applicable to other points in that neighborhood, and therefore not within the rule asserted as to the unmistakable description of the place of beginning herein adopted, I have concluded it is best that all parties, claiming an interest in the proper location of said grant, should be notified of the time and place of the new survey, and that testimony offered, tending to elucidate the matter should be taken, and the information thus obtained acted upon in making said survey.

* * * * *

With the modifications and additions stated, I approve of the other instructions given by your letter of April 10, 1885, to the surveyor general.

RAILROAD GRANT—ACT OF MARCH 3, 1865.

GREENHALGH *v.* ST. PAUL M. & M. RY. CO.

By definite location, and indemnity withdrawal under the additional grant of 1865, the lands covered thereby were excluded from entry and settlement.

Acting Secretary Muldrow to Commissioner Sparks, April 5, 1887.

I have considered the case of James Greenhalgh *v.* the St. Paul, Minneapolis and Manitoba Railway Company, on appeal by the former from your office decision of October 11, 1883, rejecting his application to make homestead entry for Lots 12, 15 and 16, in the SW. $\frac{1}{4}$ of Sec. 31, T. 150, R. 46, Crookston, Minnesota.

Said application was made on January 2, 1883, and was rejected by the local officers.

By act of Congress approved March 3, 1857, (11 Stat., 195,) a grant of land was made to Minnesota, then a Territory, to aid in the construction of certain railroads, of every alternate section designated by odd numbers for six sections in width on each side of such roads, with a right to select indemnity from odd sections in no case further than fifteen miles from the lines of said roads. By the act of Congress of March 3, 1865 (13 Stat., 526), the quantity of land granted by the act of 1857 was increased to ten sections per mile, with an enlargement of the limits within which indemnity lands might be selected from fifteen to twenty miles. One of the roads thus provided for was the Saint Paul and Pacific. By act approved March 3, 1871 (16 Stat., 588), said road was allowed to alter its branch line as located under the original act, and to locate and construct it "from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered line, as is provided for the present line by existing laws." The line thus provided for was known as the St. Vincent Extension, now the St. Paul, Minneapolis and Manitoba Railway.

In the case of Barney *v.* Winona and St. Peter Railroad Company, the supreme court, in reference to said grants, held that the grant of 1857 "was one by description, that is of land in place and not one of quantity. It was of particular parcels of land designated by odd numbers for six sections on each side of the road; that is, of particular parcels of land lying within certain defined lateral limits to the road and described by numbers on the public surveys. The grant of the four additional sections by the act of 1865 was also a grant of land in place. The intention of Congress was to enlarge the first grant from six to ten sections per mile, the additional four to be taken in like manner as the original six, and subject to the same limitations, and to others that had been or might be prescribed, with a right to select indemnity lands

within twenty miles instead of fifteen. The act did not purport to change the character of the first grant, but to increase its quantity." (117 U. S., 228.)

The limits of the granted lands, and of the indemnity lands are therefore ten and twenty miles, respectively, from the road.

An inspection of the plats of your office shows that lot 15 of the land in question falls within the ten-mile or granted limits for said St. Vincent Extension—St. Paul and Pacific Railroad Company—the right of which attached on December 19, 1871, upon acceptance of its map of definite location. Said Lots 12 and 16 fall within the indemnity limits of said line, notice of the withdrawal for which was received at the local office February 15, 1872. The record fails to show that at the date of the withdrawals or prior thereto there was any claim to the land but that of the company.

The application of Greenhalgh, made long after the rights of the company had attached to the granted lands, and after notice of withdrawal in the indemnity limits, must therefore be rejected.

Said decision is accordingly affirmed.

RAILROAD GRANT—RES JUDICATA.

ELWELL v. NORTHERN PAC. R. R. CO.

A final decision against a right asserted under the pre-emption law is no bar to a claim by the same person for the same land under a different law.
Land held and occupied under a settlement claim is not subject to indemnity selection.

Acting Secretary Muldrow to Commissioner Sparks, April 8, 1887.

I have considered the case of Robert Elwell v. the Northern Pacific Railroad Company, involving the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 9, T. 10 N., R. 39 E., Walla Walla, Washington Territory, on appeal by the company from the adverse decision of your office, dated February 20, 1884.

It appears that the land is surveyed, unoffered land, within the indemnity limits of the withdrawal for the benefit of the Northern Pacific Railroad Company.

Elwell filed declaratory statement January 19, 1871, for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of 8 and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 9, T. 10, R. 39, alleging settlement July 1, 1870. In 1872 he sought to prove up on his pre-emption claim, but his application was refused, because the land in section nine was within the limits of the grant to said railroad company, and on appeal a hearing was ordered by the Commissioner. At this hearing the railroad company did not appear, and the local officers recommended that the application be granted. This action was not approved by your

predecessor, Commissioner Drummond, who, on July 21, 1873, ordered that the declaratory statement be canceled as to the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 9—holding that Elwell, having failed to file his claim within the time required by law, three months after settlement, the adverse interest of the railroad company attached under the withdrawal of December 8, 1870. There being no appeal from this decision, the case was closed and the declaratory statement canceled September 4, 1884, as to the odd numbered section.

On July 17, 1875, Elwell transmuted his filing on the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 8 into homestead entry No. 334, made final proof and entry thereon November 2, 1881, for which patent was duly issued to and accepted by him April 10, 1882.

The withdrawal of December 8, 1870, for the benefit of the Northern Pacific Railroad, which was held to have precluded Elwell from holding the land under his filing of January 19, 1871, was made on map of general route and withdrew the land for forty miles on each side of the road, or only within the granted limits. On February 21, 1872, the company filed another map, containing "a preliminary line" of said road, or general route, which entered Washington Territory on the east at a point over one hundred miles further north than the former, but converging so that at the Columbia river the lines of both routes became substantially the same. At the request of the company, withdrawal was made under this second map on March 30, 1872; and the land in controversy was within the lines of both withdrawals. Afterwards, on October 4, 1880, the line of said road was definitely located, when another withdrawal, in conformity with the map of definite location, was made, when the land in controversy was found to be outside of the granted but within the indemnity limits, for which withdrawal was made November 30, 1880.

On January 5, 1884, the company included the said tract in its list of indemnity selections. Against this selection, on January 31, 1884, Elwell filed protest in your office, alleging that he has continued in possession of said SW. $\frac{1}{4}$ of section 9 ever since he first made settlement thereon in July, 1870; that up to January 1, 1876, together with his family, his actual residence was upon the same; that it has always been under one inclosure with the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 8, and with the latter worked as one farm; that he has buildings and improvements of large value on said W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 9, and seventy acres thereof under cultivation. He insists that error was committed in refusing to permit him to make final proof and entry of the tracts in both sections, and he prays that he may now be allowed to surrender his patent for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of section 8, amend his homestead entry by including therein the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 9, and that a new patent may be issued to him covering both of said tracts. Your predecessor approved of this application of Elwell and directed that the same be

granted. From this action the railroad company has appealed; and on its appeal the case is now before me.

I do not regard the present case as coming within the rule of *res adjudicata*, for the application of Elwell, now under consideration, is that he be allowed to enter and patent the land under the homestead laws, thus seeking to obtain it under a new and different right from that under which his former application was made, and he is entitled to have his present application considered as fully and fairly as though none other had ever been made by him for that tract, and acted upon by the land officers. See *St. Paul, M. & M. Ry. Co. v. Paulsen* (4 L. D., 232); *Hastings & Dakota Ry. Co. v. Whitnall* (ib., 249); *Olson v. Larson* (ib., 403); *Holmes v. N. P. R. R. Co.* (5 L. D., 333).

The settlement of Elwell, July 1, 1870, excepted the land from the first withdrawal of December 8, 1870, and also from the second one of March 30, 1872, when his filing was actually of record, and the land was not within the granted limits of the third withdrawal, made on the definite location of the road. So that though the land within the limits of the withdrawal of December 8, 1870, has not been restored to the public domain, and the tract in question is within those limits, the company acquired no right to it by virtue of either that withdrawal or the one of March 30, 1872, because it was not then free from the pre-emption claim of Elwell. And, because of the continuing occupation of Elwell, it was not subject to the selection of the company as indemnity land, on January 5, 1884.

In the consideration of the present application the former judgment should neither estop nor prejudice the claims of Elwell, but should rather advance them, because explaining the delay in their presentation. The continuous occupation and inclosure of the land, since the first settlement, has been a daily, persistent and aggressive assertion of right thereto, and, since the former decision, a constant protest against its correctness. These are facts which may be properly considered in dealing with a case of this sort.

The evidence of Elwell's settlement, occupation, inclosure and cultivation of said land not being traversed, may be treated as being conceded by the attorney for the company; and inasmuch as the showing in relation thereto is satisfactory to your office, further hearing is not ordered, but I approve of the proposed action in canceling the selection of the company, accepting the surrender of Elwell's patent and allowing the proper amendments, so as to include the land in controversy in a new patent to be issued to him.

The judgment of your office is therefore affirmed.

FEES OF LOCAL OFFICERS—ACCOUNTS.

CIRCULAR.

Acting Commissioner Stockslager to registers and receivers, August 18, 1886.

Your attention is called to the following extract from the act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1887, approved August 4, 1886:

"All fees collected by registers and receivers, from any source whatever, which would increase their salaries beyond three thousand dollars each year, shall be covered into the Treasury, except only so much as may be necessary to pay actual cost of clerical services employed exclusively in contested cases, and they shall make report quarterly, under oath, of all expenditures for such clerical services, with vouchers therefor."

In accordance with the act of Congress, as quoted, receivers will, from and after August 1, 1886, deposit to the credit of the Treasurer of the U. S. all moneys received for reducing testimony to writing, and all other fees which, by the act of March 3, 1883, were authorized to be retained by registers and receivers (except the amount payable for clerk hire, in accordance with the terms of the law), as other public moneys of the United States received from fees and commissions are deposited. All such fees will be reported *in detail* on the receivers' monthly detailed account-current thereof (Form 4-146), and accounted for in their monthly and quarterly accounts.

The fee of one dollar, authorized to be retained by the register for giving notice of the cancellation of an entry, as provided by the act of May 14, 1880, will be paid to the receiver, who will deposit it with the other fees.

Receivers will render special disbursing accounts for the sums paid out for clerical services rendered in contest cases, which must be verified under oath and supported by the proper vouchers.

The circular of this office, dated July 20, 1883,* and all subsequent instructions not in accordance with this circular are hereby modified accordingly.

You will please acknowledge the receipt of this circular.

Approved:

L. Q. C. LAMAR,
Secretary.

* See 2 L. D. 662.

PRIVATE CLAIM—SCRIP—JUNE 2, 1858.

STEPHEN SWEAYZE.

The authority of the surveyor-general to issue scrip under the third section of the act of June 2, 1858, is subject to the supervisory jurisdiction of the Commissioner of the General Land Office, acting under the direction of the Secretary of the Interior.

Indemnity-scrip can issue under said act only on the existence of two conditions: (1) The claim must have been confirmed, and (2) it must, for some reason named in the act, remain unlocated and unsatisfied.

An unsatisfied claim for a specific quantity of land, founded on an order of survey made in 1795, with no specific location of the land, is a proper basis for the issuance of scrip under said act.

The uncontroverted finding of the surveyor-general that a claim has not been located, or in any manner satisfied, shall be taken as satisfactory proof of such fact.

The applicant for scrip must show himself to be the legal representative of the original confirmer.

Acting Secretary Muldrow to Commissioner Sparks, April 8, 1887.

The several acts of Congress approved respectively March 2, 1805 (2 Stat., 324), April 21, 1806 (*id.*, 390), and March 3, 1807 (*id.*, 440), provided for ascertaining and adjusting the titles and claims to land within the territory of Orleans, and the district of Louisiana, and pursuant to these acts Commissioners were appointed to investigate and report upon such titles and claims. In the report of the Commissioners, thus appointed, for the western district of Louisiana, dated May 1, 1815, the private land claim of Stephen Sweayze, numbered 137, class B, among others, was recommended for confirmation. See American State Papers, Green's Edition, Vol. III, pp. 109 and 133.

This report and recommendation is in the words following, to wit:

Stephen Sweayze claims four hundred arpens of land in Attakapas, by virtue of an order of survey dated 9th December, 1795. The notice is accompanied by the petition of said Sweayze, inhabitant of Natchez, dated 20th November, 1795, for ten arpens of land on each side of the gully, called Cypremart, with the small depth that may be found, bounded on one side by land of Samuel and John Bell, and on the other by the royal domain. Subjoined to the petition is the order of survey by the Baron Carondelet, dated 9th December, 1795, for the ten arpens front solicited, with the depth that may be found, not exceeding forty arpens. A plat of survey by William Atchison, dated Attakapas, 16th December, 1796, embracing four hundred arpens in a square form, is also filed. No proof of occupancy has been offered, and the claim is reported on that account. The Commissioners, believing it to be a claim which would have been deemed valid under the Spanish government, recommend its confirmation in conformity with the tenor of the order of survey, giving ten arpens front on said gully, with the depth of twenty arpens on each side embracing an area of four hundred arpens.

This claim was confirmed by the first section of the act of Congress, approved April 29, 1816, (3 Stat., 329), but it seems never to have been located, as will more fully appear hereafter.

On the 14th of August, 1877, the surveyor-general of Louisiana issued certificates of location on this claim under the provisions of the third section of the act of June 2, 1838 (11 Stat., 294), and on the same day transmitted them to your office for approval and authentication. These certificates, are numbered 357 A to 357 D, inclusive, certificates A, B, and C being for eighty acres each, and certificate D for 100.28 acres—in all 340.28 acres, or 400 arpens, French measure—and were issued upon the application of D. J. Wedge, who asserted title to the Sweayze claim under and by virtue of the proceedings of a succession sale of the estate of the deceased confirmee, alleged to have been had on the 29th day of August, 1872, in pursuance of a decree of the parish court in and for Lafayette parish, in the State of Louisiana.

The surveyor general, in his letter of transmittal before mentioned, makes the following report in the matter of this claim :

I have the honor to state that upon a careful and complete examination of the maps of surveys, records, and other data in this office, I find that this claim has never been located. I also find that the attention of Deputy-Surveyor R. C. Trimby was called to this claim in an order of survey, dated November 10, 1835, by Surveyor General Williams, with directions to locate it, but owing, it is supposed, to the want of exact data and the fact that the land which this claim embraced had been surveyed as public land in the year 1832, it was deemed best not to locate it and cause unnecessary conflict of surveys. Again, in 1857, when a correction of some of the surveys in T. 15 S., R. 7 E., SW. D., was being made by Deputy-Surveyor Anthony Doherty, it was the desire of this office to locate this claim, but upon application to the register of the land office at Opelousas, he stated that that office contained no record or papers which could aid the deputy-surveyor to establish the boundaries of this claim on the ground.

I find upon file in this office, under date of September 2, 1872, a petition for relief under the act hereinbefore cited, accompanied by evidence of title in the present legal representative of the said Sweayze. My attention has been more recently called to this claim, and the proof being satisfactory respecting the confirmation, transfer of title, and that the claim remains unlocated and unsatisfied, I have caused the scrip to issue.

When the scrip came up to your office, the Commissioner refused to approve and authenticate it, holding the evidence upon which it was issued was too meager and unsatisfactory. Finally, by letter to W. A. Coulter, Esq., one of the attorneys for the present alleged legal representative of the original claimant, dated December 16, 1885, your office adhered to its former order of suspension in the matter of this and certain other claims of similar character, and refused to deliver the scrip aforesaid, because of the rulings in the cases of *Madam Bertrand* (Land Office Report 1879, p. 215), and *Joshua Garrett* (2 C. L. L., 1005).

Thereupon, an appeal was duly taken by Mr. Coulter, and the case has been very carefully considered by me. Counsel have been heard orally and fully as to the questions involved herein, and have also filed briefs in support of the position taken by them in the matter of this claim.

The third section of the act of 1858, under the provisions of which these certificates were issued, concludes as follows :

That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States, subject to sale at private entry at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions.

Upon the state of facts hereinbefore narrated, and under the provisions of the act just quoted, it is most earnestly insisted by counsel that the action of the surveyor-general of Louisiana, in finding that said claim had been confirmed, that the same remained unlocated and unsatisfied, and that the legal representative of the deceased confirmee was entitled to certificates of location, and also his action in determining who is such representative and in issuing the scrip aforesaid in favor of the party so found by him to be such representative, is final; that there is no authority or power vested in the Commissioner of the General Land Office, or in any other officer or tribunal, to control the discretion exercised by the surveyor-general in the matter; and finally, that the act does not contemplate or require the Commissioner of the General Land Office to *approve* and *authenticate* said scrip, or to withhold the same from the party who was found by the surveyor-general to be entitled to receive it. If, however, this position is adjudged to be untenable, then it is insisted with equal earnestness that the rulings in the cases of Madam Bertrand and Joshua Garrett (*supra*) are erroneous, and that said cases should be overruled.

The first position assumed here by the appellants, viz, That the surveyor-general's action in determining to whom under the provisions of the act of 1858 scrip should be issued in any given case, and in issuing the same in favor of the party thus found to be entitled to it, is not subject to the supervision or control of the Commissioner of the General Land Office, or any other officer or tribunal, presents a new question for the consideration of the Department. So far as can be ascertained at this time, it has never been considered here before in the light in which it is now presented; and so far as can be now ascertained the uniform practice of the Department since the passage of the act of 1858 has been that all scrip issued under the provisions of the third section of said act must be approved and authenticated by the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, before it is locatable.

Even so late as September 17th last, this Department in the case of Lettricus Alrio (5 L. D., 158) assumed jurisdiction and authority to pass upon and review the action of the surveyor-general of Louisiana, in issuing scrip under the provisions of the act referred to, and in determining to whom such scrip belongs. But inasmuch as in said case the question here presented was not then directly considered and made a matter in issue, and because it is urged with such force and earnestness that the uniform practice of the land department, in the matter herein, for nearly thirty years, has been erroneous and unwarranted, I have determined to give this question a most careful consideration.

The general authority of the Commissioner of the General Land Office to supervise and control matters relating to the public lands is found in sections 453 and 2478 of the U. S. Revised Statutes. Section 453 provides:

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government.

And section 2478 provides:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title (The Public Lands) not otherwise specially provided for.

It is to be noted that no part of the said act of 1853 was incorporated into the Revised Statutes. Hence, said act exists, and has the same force and effect as if there had never been a revision of the statutes. Said act, however, must be read, not by itself, but *in pari materia* with the sections of the Revised Statutes above quoted, for it is well settled in jurisprudence that—

The correct rule of interpretation is, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. *U. S. v. Freeman* (3 How., 564).

Section 453 is a substantial re-enactment of the first section of the act of July 4, 1836 (5 Stat., 107), as modified by the act of March 3, 1849 (9 Stat., 395), establishing the Department of the Interior. This act of 1836 enlarged the authority of the Commissioner of the General Land Office over his subordinate officers; and since its passage it has been uniformly held that—

The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain. *Bell v. Hearne* (19 How., 262).

In the leading case of *Barnard's Heirs v. Ashley's Heirs* (18 id., 43), the supreme court held that this enlarged power of supervision and control given to the Commissioner of the General Land Office by the act of 1836—(at that time) under the direction of the President of the United States—extended to the consideration of matters judicial in character; and that the judgment of the register and receiver was not conclusive upon questions of fact and of law arising after the passage of that act. This construction has been uniformly followed since that time, both in the courts and in this Department, and is too well settled to require further comment.

In the case of *Maguire v. Tyler* (1 Black., 195), S. C. (8 Wall., 661), it was decided that surveys under confirmations of Spanish titles in the Louisiana country are, as regards their correctness, within the jurisdiction of the Commissioner of the General Land Office, and that that officer has power to adjudge the question of accuracy preliminary to the issuing of patent, subject in all cases to the supervision and direction of the Secretary of the Interior. See also *Snyder v. Sickles* (98 U. S., 203); *Buena Vista Co. v. I. F. & S. C. R. R. Co.* (112 U. S., 161).

But it is contended that the cases of *Kaufman v. United States* (96 U. S., 567), *Sybrandt v. U. S.* (19 Ct. of Claims, 467), and *Woolner's case* (13 id., 355), should control this one. These were cases involving the question of authority of the Commissioner of Internal Revenue, under Sec. 3220 of the U. S. Revised Statutes, which provides:

The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, etc.

The real question before the court in these several cases was, whether the court could inquire as to the sufficiency of the evidence before the Commissioner of Internal Revenue, when he, acting within the scope of his authority and jurisdiction, under the statute, has ordered the refunding of an overpaid tax; and the judgment of the court in each instance was that in such cases the decision of the Commissioner could not be thus inquired into. The courts were then simply reiterating the well-known principle of law, that, in the absence of fraud or mistake, the findings of an executive officer, acting within the scope of his authority and jurisdiction, are conclusive upon questions of fact, and will not be disturbed by the courts. I can not see anything in those cases which in any wise conflicts with the view herein taken.

I am therefore of opinion that the first point raised by appellants is not well taken. I think the section of the act of 1858 under consideration, when *in pari materia* with the general laws on the same subject, clearly contemplates that the surveyor-general's action in issuing certificates of location is subject to the supervision and control of the Com-

missioner of the General Land Office, under the direction of the Secretary of the Interior. The present practice is therefore adhered to.

Further, even admitting that the construction of this act of 1858, to this effect is, doubtful, the practice under it for nearly thirty years could not be disturbed without manifest impropriety. For "A contemporaneous understanding of a statute, corroborated by an undeviating usage of thirty years, ought to govern its judicial construction." *Dwarris on Statutes*; *Barnard's Heirs v. Ashley's Heirs (supra)*; *Brown v. United States* (113 U. S., 538), and cases cited therein.

The next question raised by the appeal before me involves a construction of said act of 1858, as to whether on the record as presented scrip should have issued on this claim.

Now, under this act two conditions must exist in a private land claim in order that scrip may issue as indemnity for the same. First, It must have been confirmed; and Second, It must, for some reason mentioned in the act, remain unlocated and unsatisfied. The first of said conditions exists in this case. As already stated, this claim was confirmed *absolutely* by the first section of the act of April 29, 1816.

The claims after confirmation, upon which scrip is to issue, are divided into two general classes. The first class comprises those claims which "have not been located or satisfied for want of a specific location prior to confirmation," and the second class embraces those claims which "have not been located or satisfied for any reason whatsoever, other than a discovery of fraud in the claim subsequent to . . . confirmation." Claims of the first class are those floating and unascertained claims—mere rights of location where a *specific quantity* of land was granted, to be taken somewhere in the vacant royal domain, but where no survey of any particular tract was made under the authority of the original donor, where no segregation of any tract was ever made and where no actual or approximate location of the boundaries of the claim was ever established. Such claims, though confirmed by Congress and though carrying a valid title under the grant, were valueless until the passage of this general act of 1858. *Claim of Benito Vasqueth* (3 Op. 615); *United States v. King et al.* (7 How., 833); *Congressional Record*, 35th Cong., 1st Sess., Vol. 36, Part 3, p. 2595. For by treaty stipulations the United States acquired in sovereignty all the lands in Louisiana which had not before the date of the treaty of 1803 been granted by the French or Spanish authorities and severed as private property from the royal domain. *United States v. King (supra)*; *Les Bois v. Bramell* (4 How., 449).

The second class embraces those claims which *prior* to confirmation had a "specific location," but which, for some reason other than the discovery of fraud in the claim *subsequent* to confirmation, could not be satisfied out of the lands embraced within such specific location. As for instance where two or more adverse claims were confirmed for the *same tract of land*, or overlapped to any extent whatever, as not infre-

quently was the case in those private land claims in Louisiana. *Choteau v. Eckhart* (2 How., 314), *Les Bois v. Bramell* (*supra*), *Sylvester Bossie* (Land Office Report for 1879, p. 218). In such cases these conflicting claims were determined, and the claimant found to possess the best legal and equitable title took the land in place. Necessarily the pretensions of the other claimants to *the same land* were rejected, and the justice of the government had to be relied upon by them for compensation; and this compensation the act of 1858 provided.

A title resting on a permit to settle and an order of survey, dated before the year 1800, without any settlement or survey having been made, was an incomplete title. It gave no right to any specific location of land until surveyed. In other words, there was no "specific location" of the claim until surveyed. *Barry v. Gamble* (3 How., 32). Such claim, therefore, is within the descriptive terms of those embraced in the first class above.

The claim under consideration would seem to fall fairly within this class. It was for a specific quantity of land, with no specific location, founded on an order of survey dated in 1795, and no segregation from the royal domain of any particular tract by survey or otherwise was made prior to confirmation. True, there was filed with the petition presented to the board of land commissioners "A plat of survey by William Atchison, dated 16th Dec. 1790," embracing the amount of land in this claim. But this survey if it amounted to anything at all was simply a *private survey*, not binding upon any one, and did not operate as a segregation of any particular tract of land. *Les Bois v. Bramell* (*supra*). The petition presented to the board recites that this claim is "bounded on the one side by land of Samuel and John Bell, and on the other by the royal domain." But as it appears this gave it no specific location, at least not sufficient to enable a survey of the claim being made. The location was only given approximately "on each side of the gully called Cypremart." Another reason for its non-location in place is found in the report of the surveyor-general "that the land which this claim embraces had been surveyed as public land in 1832, and it was deemed best not to locate it and cause unnecessary conflict of surveys."

There has been no suggestion of fraud in this claim, either on the part of the original confirmer or the present applicant; hence this element does not enter into a consideration of the case. It has been found by the surveyor-general, as a fact, that this claim has never been located in place, and that it remains yet wholly unsatisfied. This fact is not denied or controverted by any one, and must therefore be accepted as established. Your office, however, required that the actual or approximate boundaries—the original locus—of the claim should be shown before scrip should issue. This is a requirement that can never be complied with and was never contemplated in the act of 1858; for as already established this claim *never had a specific location*, and never operated

as a segregation of *any tract* from the *royal domain* under the foreign governments or from the *public domain* under this government. It is, therefore, a claim such as the act of 1858 contemplates.

Upon this branch of the case, therefore, I reverse your office decision and hold that scrip may properly be authenticated upon this claim, if the applicant therefor shall show himself to be entitled to receive it as the legal representative of the original confirmer. The "Bertrand" case does not necessarily conflict with this decision.

The only remaining question in the case is, as to whether the present applicant is the legal representative of the original confirmer as defined in the case of Lettricus Alrio (*supra*) and John Shafer (5 L. D., 283), overruling the "Garrett" case (*supra*).

As already stated, the present applicant for scrip, the appellant herein, claims under and by virtue of an alleged succession sale of the effects of the deceased confirmer, said to have been had on the 29th day of August, 1872, in pursuance of a decree of the parish court in and for Lafayette parish, in the State of Louisiana. As evidence of such proceedings is filed here what purports to be a *copy of a procès verbal* of said succession sale. But an inspection of said paper discovers the fact that it can not be admitted here as evidence. It is nothing more than an unauthenticated copy of a *procès verbal*, or an unauthenticated *copy of a copy* of the original record. It requires no argument or citation of authorities to show that this is not evidence. Further, even admitting this to be a properly authenticated *procès verbal*, it is not sufficient to bring the case within the rule laid down in the late case of John Shafer (*supra*). As was said in that case the parish courts of Louisiana are courts of limited and special jurisdiction; and before their judgments can be received as conclusive the jurisdictional facts must be made to appear upon the face of the proceedings.

For these reasons the present application is denied. The decision appealed from is modified accordingly.

ACCOUNTS—FEES—TESTIMONY—TRANSCRIPTS, ETC.

CIRCULAR.*

Commissioner Sparks to registers and receivers, March 15, 1887.

Your attention is called to the following provisions of law:

"Registers and receivers are allowed, jointly, at the rate of fifteen cents per hundred words for testimony reduced by them to writing for claimants in establishing preëmption and homestead rights. (Sec. 2238, subdivision 10, R. S.)

"A like fee as provided in the preceding subdivision, when such writing is done in the land office, in establishing claims for mineral lands. (Sec. 2238, subdivision 11, R. S.)

* See 2 L. D., 662; 5 id., 245 and 569.

"Registers and receivers in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana are each entitled to collect and receive fifty per centum on fees and commissions provided for in the first, third, and tenth subdivisions of this section. (Sec. 2238, subdivision 12, R. S.)

"The register for any consolidated land district, in addition to the fees now allowed by law, shall be entitled to charge and receive for making transcripts for individuals or furnishing any other record information respecting public lands or land titles in his consolidated land district, such fees as are properly authorized by the tariff existing in the local courts of his district, and the receiver shall receive his equal share of such fees, and it shall be his duty to aid the register in the preparation of the transcript or giving the desired record information. (Sec. 2239, R. S.)

"The register and receiver shall be entitled to the same fees for examining and approving testimony given before the judge or clerk of a court in final homestead cases as are now allowed by law for taking the same. (Act of Congress, approved March 3, 1877.)"

This refers to the fees provided for in the tenth and twelfth subdivisions, sec. 2238, R. S., above mentioned.

Under the timber and stone land act of June 3, 1878, the registers and receivers in the States of California, Oregon, and Nevada, and in Washington Territory, are entitled, jointly, at the rate of twenty-two and one-half cents per hundred words for testimony reduced to writing for claimants.

Under the timber culture act of June 14, 1878, registers and receivers are not entitled to any fees for reducing testimony to writing in taking final proofs, but in contested cases they are allowed the same fees for reducing testimony to writing as in other contest cases.

This refers to the fees provided for in the tenth and twelfth subdivisions, section 2238, R. S., and said fees are to be collected for reducing testimony to writing for contestant and contestee.

Your attention is called to the following act of Congress, approved March 3, 1883:

AN ACT in relation to certain fees allowed Registers and Receivers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the fees allowed registers and receivers for testimony reduced by them to writing for claimants in establishing preëmption and homestead rights and mineral entries, and in contested cases, shall not be considered or taken into account in determining the maximum of compensation of said officers.

SEC. 2. That registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts showing what lands are vacant and what lands are taken, and shall be allowed to receive compensation therefor from the party obtaining said plats or diagrams at such rates as may be prescribed by the Commissioner of the General Land Office, and said officer shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for the same not to exceed ten cents per entry; and the sums thus re-

ceived for plats and lists shall not be considered or taken into account in determining the maximum of compensation of said officers.

Your attention is also called to the following extract from the act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1887, approved August 4, 1886:

"All fees collected by registers and receivers, from any source whatever, which would increase their salaries beyond three thousand dollars each year, shall be covered into the Treasury, except only so much as may be necessary to pay actual cost of clerical services employed exclusively in contested cases, and they shall report quarterly, under oath, of all expenditures for such clerical services, with vouchers therefor."

In accordance with the act of Congress, as quoted, receivers will deposit to the credit of the Treasurer of the United States all moneys received for reducing testimony to writing, and all other fees which, by the act of March 3, 1883, were authorized to be retained by registers and receivers (except the amount payable for clerk hire, in accordance with the terms of the law), as other public moneys of the United States received from fees and commissions are deposited. All such fees will be reported in detail on the receiver's monthly detailed account-current thereof (Form 4-146), and accounted for in their monthly and quarterly accounts. *But fees not earned, that is deposits made for services to be rendered, are not to be deposited or accounted for until they become public moneys of the United States.*

The fee of one dollar, authorized to be retained by the register for giving notice of the cancellation of an entry, as provided by the act of May 14, 1880, will be paid to the receiver, who will deposit it with the other fees, when the entry is canceled and the notice given. Should the cancellation not take place and no notice be given the fee is to be returned to the depositor.

In computing the fees for reducing testimony to writing the words actually written by registers and receivers, or persons in their employ, only must be charged for at the rates allowed by paragraphs 10, 11, and 12, of section 2238, R. S., and no charge is to be made for the printed words. The words actually written must be counted and charged for, and there can be no uniform fee of a specified sum applicable to every case of the same class of entries; that is, registers and receivers cannot fix the fee at one dollar or more for each preëmption, final homestead, or mineral entry.

Under the second section of the act of March 3, 1883, authorizing a charge to be made for plats or diagrams, the fees for the same are hereby fixed as follows:

For a diagram showing entries only.....	\$1 00
For a township plat showing entries, names of claimants, and character of entry	2 00
For a township plat showing entries, names of claimants, character of entry, and number.....	3 00
For a township plat showing entries, names of claimants, character of entry, number and date of filing or entry, together with topography, &c.....	4 00

In no case are fees to be charged for examining and approving testimony given before the judge or clerk of a court except in final homestead cases.

The attention of registers and receivers is called to section 2242, R. S., which is as follows:

"No register or receiver shall receive any compensation out of the Treasury for past services who has charged or received illegal fees; and on satisfactory proof that either of such officers has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office."

You will be held to a strict compliance with laws and regulations relating to the matter of fees in all cases.

Registers of land offices have no right officially to receive any moneys whatever except such as are paid to them by receivers as salary, fees, and commissions. Should any money be forwarded to the register or paid to him, he will at once pay over the same to the receiver; and where parties address the register as to the cost of any service required, he will refer the matter to the receiver for answer, as the latter is the proper officer to receive all public moneys.

In order to secure uniformity in the preparation of accounts of receivers relative to moneys received for reducing testimony to writing, and for clerical services rendered in contest cases, under the act of August 4, 1886, the following method will be observed:

Receivers will credit the United States in their accounts as receiver with the gross amount of all fees received except such sums as are paid by them for clerk hire in contest cases, which sums must be deducted from the gross proceeds received, and should not be included in the amounts so credited. They will also debit the United States with the deposits of such receipts exclusive of the amounts for clerk hire referred to above. In the special disbursing accounts for clerical service in contest cases, they will credit the United States with the amounts that were necessary to pay for clerk hire in such cases, and will debit the United States with disbursements for that service, supporting the account with sworn statements and proper vouchers. This account should exactly balance.

The excess of receipts from fees over the expenses of clerical service must be reported in the receiver's weekly statements, monthly fee statements, and in their quarterly and monthly accounts-current.

Receivers will also report in detail on their receiver's monthly statements (Form 4-146) all receipts for reducing testimony to writing, and also enter on the same the expenses incurred for clerical service.

Whenever money is received from a party in payment of fees, the receipt thereof should be duly acknowledged. It is therefore directed that in cases where testimony, in establishing a preëmption, homestead, or mineral claim, or the right to enter land as being valuable chiefly for timber or stone but unfit for cultivation, under the act of June 3, 1878, has been submitted and an entry or location is allowed or final home-

stead papers issued on such testimony, and also where a fee is paid for allowing entries under the timber-lands act of June 3, 1878, the receiver shall indorse on both the original and duplicate receipt, or certificate of location, where there is no receipt in the case, as acknowledgment of the amount of fees received for reducing testimony to writing, examining and approving the same, or other special account as the case may be; and that in contested cases where testimony is taken, as also in cases where transcripts of records are furnished under section 2239, R. S., or fees received under the act of March 3, 1883, he shall issue a receipt for the money to any party paying the same (it being the duty of the receiver to receive and receipt for the money in every case), but no duplicate of the special receipt so issued need be transmitted to this office.

This circular is designed to take the place of circulars "M" of July 20, 1883, August 18, 1886, and November 6, 1886.

Approved:

H. L. MULDROW,
Acting Secretary.

OSAGE TRUST LANDS—ENTRY.

CIRCULAR.

Commissioner Sparks to registers and receivers, April 26, 1887.

The Osage Indian trust and diminished reserve lands are subject to sale to parties having the qualifications of preëmptors on the public lands.

Claimants are required to file a declaratory statement within three months from date of settlement, and to make proof and payment within six months from date of filing.

The proof must be made after notice by publication, before the officers authorized to take proof in preëmption cases, and must show that the claimant is a qualified preëmptor and an actual settler on the land at the date of application to enter. Six months continuous residence next preceding date of proof, is not an essential requirement, but it is essential that the settlement be shown to be actual and *bona fide*.

Payment for these lands must be made in cash at the rate of \$1.25 per acre, and may be made by installments, one-fourth the purchase price when proof is made, the remainder in three equal annual installments with interest on the deferred payments at the rate of five per cent. per annum.

Section 3, of the act of May 23, 1880, provides that when default in payment of any installment of the purchase money, when it becomes due, continues, the land may be offered at public sale, after advertisement, unless before the date fixed for the offering, payment of the whole purchase price is completed.

After payment of the first installment of purchase money has been made, the lands are subject to taxation according to the laws of the State of Kansas.

Payment of the remaining installments must be made by the entryman or in his behalf, and patents can be issued to entrymen only.

By filing Osage declaratory statements in accordance with the act of May 28, 1880, the right of preëmption to such—or any other lands—is thereby exhausted.

Approved:

H. L. MULDROW,
Acting Secretary.

RAILROAD GRANT—INDEMNITY SELECTION.

ALABAMA AND CHATTANOOGA R. R. CO. *v.* TENNESSEE AND COOSA
R. R. CO.

Land within the granted limits of a road not constructed within the required time, but definitely located and not forfeited by Congress, is not subject to the indemnity selection of another road.

Acting Secretary Muldrow to Commissioner Sparks, January 29, 1887.

The attorney for the Alabama and Chattanooga Railroad Company has filed an informal motion asking a modification of departmental decision, dated the 13th instant, in the case of said Company *v.* Tennessee and Coosa Railroad Company, involving certain lands in the Huntsville land district, Alabama. Said decision merely affirmed that of your office, dated July 28, 1885, which concluded as follows:

The tracts in question are within the six mile (granted) limits of the grant to the State of Alabama by Act of June 3, 1856, to aid in the construction of the Tennessee and Coosa Railroad. The grant for the road has not been declared forfeited and the lands are not subject to selection by the Alabama and Chattanooga Railroad Company as indemnity.

This motion is not served upon the opposite party as is required by the rules; but inasmuch as the modification asked for would not change the conclusion reached in said decision, but would only base it upon other grounds, I have concluded to give the matter consideration.

It is insisted that while the conclusion reached, to wit: that the Alabama and Chattanooga Railroad Company's selection of the particular lands here in controversy should be rejected, is correct, it is based upon wrong grounds. As already stated, the rejection rested upon the ground that the Alabama and Chattanooga road could not select as *indemnity* lands within the *granted* limits of the Tennessee and Coosa road, although as a matter of fact the latter road had not been built within the time required by the granting act, it appearing that the road had been definitely located and the grant never having been forfeited by

Congress. This ruling rested upon the authority of the well known case of *Schulenberg v. Harriman* (21 Wall., 44), although no mention was made of said case in said decision. It is further insisted that said decision is "foreign" to the real question involved in this case, for this reason, viz: That the lands here in controversy had been certified over to the State in 1860 for the benefit of the Tennessee and Coosa Road, and therefore this Department has no authority and jurisdiction to pass upon the merits of the case at all. Now, while it may be true that these lands have been certified over to the State of Alabama for the benefit of the Tennessee and Coosa Road, and while it may be admitted for the sake of further inquiry that such certification would carry title as completely as patents, yet it must be admitted that those facts did not appear in your said office decision, neither were they raised by counsel in his appeal from said decision to this Department. On the contrary, no mention was made of that fact in said appeal and argument based thereon, but argument was strenuously made that, upon the record as then presented, the Alabama and Chattanooga road was entitled to the lands in question as indemnity lands. These additional facts (if such they may be called) were known by counsel when his said appeal was taken; and while if they had appeared in the record, the decision complained of might have been based upon a somewhat different ground from the one stated, yet I can not see that said decision is in any particular incorrect. The question before the Department when said decision was rendered was fully argued upon brief by counsel for each party to the case, and the whole matter was then given a very careful examination and a thorough consideration.

I see no reason either for receding from the views expressed in said decision of the 13th instant, or for modifying them.

The application of counsel is therefore denied.

HOMESTEAD ENTRY—AMENDMENT.

HENRY E. BARNUM.

The right of amendment recognized where the entry was not for the tract intended and due care and prudence had been exercised.

Acting Secretary Muldrow to Commissioner Sparks, March 11, 1887.

May 9, 1885, Henry E. Barnum made homestead entry No. 7375 of the SE. $\frac{1}{4}$ of Sec. 4, T. 11, R. 36, North Platte, Nebraska. June 3d following the local office transmitted the duly corroborated application of said entryman, asking that he be allowed to amend his entry so as to embrace in lieu of the tract entered the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, same section, or in case said tracts had been already entered, then he asked that his said entry be canceled without prejudice and he be

allowed to enter the SW. $\frac{1}{4}$ of Sec. 8, same township and range, with credit for fee and commissions.

In said application claimant alleged that being a stranger in that country, before making his entry he in company with one James Stanley, who was "a kind of land locator" and appeared to be familiar with all the land thereabouts, looked over various tracts of land so as to secure a suitable tract for a home; that Stanley showed him a good smooth quarter section and informed him that he well knew the boundaries of the land in that section, having previously surveyed all the land in that vicinity and that the land shown him was properly described as the SE. $\frac{1}{4}$ of Sec. 4, T. 11, R. 36; that relying upon the statements made by Stanley, and not being able to find any "land marks" or "survey stakes," he made his entry as aforesaid, and immediately went to one of the eastern counties in the State and brought his family and household goods to the land, with the intention of establishing a home there; that he then for the first time ascertained that the land he had entered was not the tract he supposed he had entered, but was a worthless tract composed of nothing but a waste of sand; and that the tracts to which he now seeks to amend are the tracts that he intended to enter, and which he supposed he had entered. Stanley corroborates this application.

July 9th following your office considered the case and rejected Barnum's application, for the reason that the tracts to which he seeks to amend had already been entered by other persons, and for the further reason that the field notes of the tract entered show said last mentioned tract to be "'rolling soil second rate,' which is generally regarded as good soil."

Barnum thereupon moved for a reconsideration of said decision, and filed with his motion therefor two affidavits, showing clearly the worthless character of the tract entered by him, and the error in the field notes in relation to the same.

Thereupon, by decision dated September 22, 1885, you reconsidered said decision of July 9th preceding, and found that the tract embraced in Barnum's entry "is composed of fine sand and is unfit for agricultural purposes." You, however, adhered to the conclusion in the former decision and again denied the application to amend, holding that "It does not appear to the satisfaction of this office that Barnum used the proper care in making his entry."

From this decision an appeal has been brought here and the case has been duly considered. The allegations in the appeal are substantially the same as those in the original application; and from a careful examination of the entire record, I am of opinion the present application should be granted. The applicant appears to have acted in the best of faith, and his mistake, I take it, is such a one as is liable to be made by a man exercising ordinary care and prudence. .

If, as stated by you, the tracts which he intended to enter, to wit, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of said section 4, had been entered by other persons prior to the present application to amend, I see no objection to allowing him the privilege of making entry of the SW. $\frac{1}{4}$ of said Sec. 8, subject to any valid adverse claim attaching prior to the date of the present application.

The decision appealed from is therefore reversed.

PRACTICE—APPEAL—DECISION OF LOCAL OFFICE.

McSHERRY v. GILDEA.

A decision of the local office, not coming within any of the exceptions in rule 48, in the absence of appeal becomes final, and should not be reversed by the General Land Office.

Acting Secretary Muldrow to Commissioner Sparks, April 11, 1887.

December 20, 1882, John Gildea made homestead entry No. 11283, of the SW. $\frac{1}{4}$ of Sec. 34, T. 107 N., R. 43 W., Tracy, Minnesota. Against this entry Peter McSherry, on the 23d of July, 1883, brought contest on the general charge of abandonment. Hearing was had November 15, 1883. Upon the evidence then adduced the register and receiver rendered a decision holding that the entryman had never established residence on the tract as required by the homestead law; that his claim was made in bad faith, his very slight improvements being made for the purpose of "holding the claim down"; and that therefore said entry ought to be canceled. From this decision no appeal was taken by claimant, and the case came up to your office under the rules. June 10, 1885, your office rendered a decision holding that the entryman had substantially complied with the law, although no residence was shown; that he had acted in good faith; and that therefore the contest should be dismissed. Thereupon appeal is brought here and the case has been given due consideration.

It is insisted on behalf of appellant that the decision of the local office upon the facts in the case became final for want of appeal, and that therefore your office erred in reversing said decision, or in even considering the evidence in the case, citing rule 48.

This rule provides:

In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case, and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.
2. Where the decision is contrary to existing laws or regulations.
3. In the event of disagreeing decisions by the local officers.

4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

An examination of this case shows, that there is no fraud or irregularity suggested on the face of the papers, there were no disagreeing decisions by the local officers, and the record shows that Gildea was notified of the local officers' decision and of his right of appeal therefrom. This leaves remaining only the second clause of the rule, viz: "Where the decision is contrary to existing laws and regulations." The finding of the local officers was that as a matter of fact Gildea had never established a *bona fide* residence upon the land, and that he had not acted in good faith. This being their finding as to the facts, I fail to see wherein their decision recommending the entry for cancellation was "contrary to existing laws or regulations." Their judgment upon the facts as found by them could not have been otherwise than what it was and have been according to the "existing laws and regulations." Their decision then not coming within any of the exceptions in rule 48, in the absence of appeal, became final and should not have been reversed by your office. It should have been approved. Rule 48 never contemplated that as regards the parties to the case, a decision of the local officers, not coming within any of the exceptions to said rule, could be overruled by your office. This was substantially announced in the recent case of *Morrison v. McKissick* (5 L. D., 245), and is surely a wise provision.

I am therefore of opinion that your office erred in reversing the decision of the local officers. It should have been affirmed.

The decision appealed from is therefore reversed.

RAILROAD GRANT—HOMESTEAD ENTRY—FINAL PROOF.

IVERSON *v.* ST. PAUL M. & M. RY. CO.

An entry, within the limits of a prior railroad indemnity withdrawal, should be approved for patent, on final proof offered and accepted after due notice, without protest or appearance on behalf of the railroad company.

Acting Secretary Muldrow to Commissioner Sparks, April 11, 1887.

I have considered the case of Peter O. Iverson *v.* the St. Paul, Minneapolis and Manitoba Railway Company, involving the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 1, T. 122, R. 34, St. Cloud, Minnesota, on appeal by Iverson from your office decision, dated December 8, 1883, adverse to him as a homestead entryman.

It appears that the land described falls within the common twenty miles, or indemnity limits of the main line and the St. Vincent Extension of the St. Paul and Pacific Railroad (now St. Paul, Minneapolis

and Manitoba railway) company, under the grant by the act of March 3, 1865 (13 Stat., 526), which enlarged the grant of March 3, 1857 (11 Stat., 195).

By the act of March 3, 1871 (16 Stat., 588), said company was authorized on certain conditions to change or alter its branch lines "with the same proportional grant of land to be taken in the same manner along said altered lines as is provided for the present lines by existing laws."

At the date (July 19, 1865,) when the withdrawal of lands for the benefit of the main line became effective, the tracts in question were covered by subsisting homestead entries, which were afterwards, in September, 1867, canceled for abandonment. Said tracts were therefore excepted from said withdrawal for the main line.

The withdrawal for the benefit of the St. Vincent Extension, or branch line, became effective February 12, 1872, the date when notice of withdrawal was received at the local office, at which time it appears the land was vacant and unappropriated.

Iverson made homestead entry for said land June, 1875, and made final proof and final certificate issued thereon May 9, 1881. His proof shows that he established his residence upon the tract in 1875, and has since resided there continuously; that he has a house, sixteen by twenty, with other buildings, and that he had eighty acres under cultivation at the date of making final proof.

When the case came up for action in your office, more than two and a half years after said final proof was made and certificate issued, the entry was held for cancellation, on the ground that by his settlement, which the proof shows was in 1874, and by his subsequent homestead entry he acquired no rights, for the reason that the land being within the withdrawal of 1872, was not subject to settlement or entry. From that action the entryman appeals.

An examination of the records shows that appellant was qualified to make the entry, and that he complied with the homestead law. The railroad company does not dispute this, but contends that the entry should be canceled for the reason given in the decision appealed from. Appellant in this case gave due notice of his intention to make final proof as required by law. Said notice was regularly published, and it described the land and gave the names of the witnesses by whom it was proposed to make the required proof. At the expiration of the period required for publication and posting, and at the time and place specified in the notice, the entryman appeared with his witnesses and made final proof, which as already stated was accepted and final certificate issued. Said notice was an invitation to any and all parties to appear at the time and place designated therein and present their objections, if any they had, to the acceptance of the proof and the allowance of the final entry.

The company did not appear to contest the right of Iverson, and having failed to speak when it should have spoken, "it cannot now be heard to set up a claim, after the settler has made proof and payment and received his certificate from the proper officers." See case of *Brady v. Southern Pacific R. R. Co.* (5 L. D., 47), decided by this Department February 8th last, and cases therein cited.

For the reason given, and on authority of the case cited, I reverse your office decision, and the entry of Iverson will be allowed to stand.

PRACTICE—CERTIORARI—COPY OF DECISION.

LOUIS W. BUNNELL.

A copy of the decision complained of should accompany an application for certiorari.

Acting Secretary Muldrow to Commissioner Sparks, April 14, 1887.

I have before me an application for certiorari in the matter of the homestead entry of Louis W. Bunnell for the SW. $\frac{1}{4}$ of Sec. 1, T. 131, R. 56, Fargo, Dakota.

It is alleged that on November 7, 1884, the entryman made commutation proof, that by letter of July 3, 1886, your office held the entry for cancellation, that appeal was duly filed, and "that the Hon. Commissioner has formally refused to allow said appeal, on the ground that the last paragraph added to the specification of errors is a withdrawal of the appeal." A copy of said appeal is furnished and the paragraph referred to reads as follows: "This appeal is taken on the merits, and also to preserve the rights of the said Louis W. Bunnell, and in the meantime a new proof will be made as required by the Commissioner's letter 'C' of September 23, 1885, and his affidavit is hereto attached, showing his status in the case and the fact that he is endeavoring as far as possible to comply with said letter 'C,' and as soon as it was possible for him to do so, and the said claimant Louis W. Bunnell now asks that his new proof about to be made may be accepted and that patent issue to him for said tract."

Applicant does not furnish a copy of said decision of July 3, 1886, or of the decision rejecting said appeal.

It has frequently been held by this Department that the applicant for certiorari should furnish copy of the decision complained of. The *Montague Placer Mine* (1 B. L. P., 53); *Johnson v. Bishop et al.* (2 L. D., 67); *John Waldock* (4 L. D., 31).

I find it impracticable to determine the rights of the applicant herein in the present state of the record. The application is dismissed for the reason that copies of said decisions are not furnished.

PRACTICE—REVIEW—TRANSFEEE.

A. A. JOLINE.

A transferee after entry and before patent, though entitled to be heard on the sufficiency of the final proof, is in no better position with respect thereto than the original entryman.

If the showing made by the transferee would not entitle the entryman to be heard on review, the application must be denied.

Acting Secretary Muldrow to Commissioner Sparks, April 14, 1887.

On October 21, 1886, this Department affirmed your office decision of April 15, 1885, rejecting the commuted homestead proof of Aaron A. Joline for SE. $\frac{1}{4}$, Sec. 6, T. 110 N., R. 63 W., Huron, Dakota. A motion for review was filed, and on the 10th ultimo, in response to letter of December 23, 1886, you forwarded the papers in the case. The original entry was made June 29, 1883, and final proof January 26, 1884.

* * * * *

The present motion for review is filed on behalf of one Mrs. Oliver. She was not a party to the record, and it is alleged on affidavit that she is a purchaser in good faith for a valuable consideration after issuance of final certificate. The affidavits of several persons claiming to be residents in the vicinity of the tract, and stating in detail that Joline complied fully with the law, are furnished. It is further stated that Mrs. Oliver at the time of the purchase did not know there was any defect in the proof of Joline. The date of purchase is not shown.

This application is based on additional testimony as to the residence of the entryman. In the case of John C. Featherspil (4 L. D., 570), it was held: "In determining this case the fact that there is a mortgagee now interested in maintaining the validity of the entry brings no new element into the consideration thereof, inasmuch as he can have no better right than the entryman would have if present, and with whose rights the government deals only, regardless of any sale, assignment or lien made by him to third parties, recognizing, however, the right of said third parties, where their interests have been acquired subsequent to the issue of final certificate, to appear and protect the same by showing proper compliance with the requirements of the law on the part of the entryman." That ruling was affirmed in the case of Cyrus H. Hill (5 L. D., 276), wherein a motion for review on the part of certain mortgagees, based on want of notice of the Commissioner's decision, was denied, as follows: "In the case under consideration there was nothing in the record to show that Hill had mortgaged the tract in question; and it was no part of the duty of the United States officers to search the records in the proper territorial office to ascertain whether any transfer of said land had been made or lien placed thereon by him, in order to send notice of the rejection of the final proof to such transferee or lienor. Notice was sent to the entryman, an appeal was taken by

him, and on said appeal the judgment of your office was affirmed. There is therefore nothing in the first point to require the revocation of my former decision." Following the ruling in said cases, I must hold that the transferee is in no better position to complain of said decision of October 21, then would be the entryman. The allegations now made relate to the sufficiency of the residence. That question was fully considered by your office and by this Department, and passed upon in the light of the evidence then in the case. The allegations now made can not be considered as newly discovered evidence, and I am fully satisfied would not entitle the entryman to a review. This being so, the motion for review filed by his assignee must be denied.

PRACTICE—SERVICE OF NOTICE—JUDGMENT.

DOWNEY v. BRIGGS.

That the original notice of contest, instead of a copy, was left with the entryman, constitutes no valid objection to the service.

If the testimony taken at a hearing shows that an entry should be canceled such action will be ordered, though the evidence may not fully sustain the charge upon which the contest was brought.

Acting Secretary Muldrow to Commissioner Sparks, April 19, 1887.

I have examined the case of Charlie E. Downey v. Jay D. Briggs, as presented by the appeal of the former from the decision of your office, dated May 22, 1885, dismissing his contest against timber culture entry No. 973 of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 11, T. 30 N., R. 9 W., made by said Briggs May 15, 1879, at the Niobrara land office, in the State of Nebraska.

The record shows that Downey filed his affidavit of contest on March 29, 1884, alleging that the entryman failed to comply with the law as to cultivation and planting of trees, tree seeds, or cuttings, and that he "has otherwise failed to comply with the law." Notice of contest issued March 29, was served upon the defendant personally on April 8, and May 24, 1884, was set for the trial of the case. The register and receiver state that "both parties appeared at that time with their attorneys," and from the testimony submitted they find that the allegations of contestant were not proven and that the charge that the entryman had relinquished said claim was not sustained.

On May 22, 1885, your office affirmed the decision of the local office on the merits of the case, but declined to rule upon the action of the local officers in overruling the motion to dismiss said contest on account of improper service. The only objection raised to the service is, that the original notice was left with the entryman instead of a copy. This objection cannot be sustained and the decision of the local land officers in overruling the same was correct. Their statement, however, that both

parties were at the hearing with their attorneys does not exactly correspond with the record, if they intend to say that the entryman was present at the hearing. The testimony of the contestant tends to show that the land was not properly cultivated, the planting either not done at all, or not properly done; that at the date of the hearing there was not a single living tree upon said claim and that the entryman admitted that he had relinquished and sold said claim to one Benner, who was present at the hearing.

An affidavit of a justice of the peace was offered in evidence, stating that on April 4, 1884, he had taken the acknowledgment of said Briggs that he had relinquished and sold said claim to said Benner.

It does not appear that this affidavit was taken in accordance with the rules of practice for taking depositions, and, hence, cannot be considered. It clearly appears, however, that Briggs admitted that he had relinquished said tracts and sold his claim to said Benner, who was present at the hearing and did not deny this assertion. If it was untrue, Benner could easily have taken the stand and denied it. This he did not do. He was present at the hearing, interested in the defense of the claim, and when the damaging statement was made concerning the sale to him, he remained silent and did not deny that he had bought said claim. It has been repeatedly held by this Department that where the testimony taken at a hearing shows that an entry should be canceled, such action will be ordered, although the evidence may not fully sustain the charge upon which the contest was brought. *Smith v. Brandes*, (2 L. D. 95), *Murphy v. Longley et al.* (4 L. D. 239), *Lee v. Johnson* (116 U. S. 48).

It appearing that said Briggs has relinquished and sold his said claim, the entry should be canceled.

The decision of your office dismissing said contest is, therefore, reversed.

TIMBER CULTURE CONTEST—PRE-EMPTOR.

KELLY v. MAYNARD.

The term "homestead laws" in the third section of the timber culture act is used in a generic sense and will embrace the pre-emption law.

The right of contest against a timber culture entry in default extends to an applicant for the land under the pre-emption law.

The case of *Buttery v. Sprout* overruled.

Acting Secretary Muldrow to Commissioner Sparks, April 21, 1887.

On November 19, 1880, Moses Maynard made timber culture entry of the NW. $\frac{1}{4}$ of Sec. 34, T. 108 N., R. 62 W., Mitchell, Dakota. August 19, 1883, Charles A. Kelly brought contest alleging failure to comply with the law. At the hearing contestee failed to appear, and on the testimony then taken the local officers held that the allegations had

been sustained, and recommended the cancellation of said entry. No appeal was taken and the papers were forwarded in regular order. Your office, on examination of the papers, dismissed the contest, holding that, "the contest was illegal *ab initio*, for the reason that the contestant applies to make pre-emption filing, instead of homestead or timber-culture entry of the tract. See *Buttery v. Sprout*, 2 L. D., 293."

The case cited holds that *Buttery's* contest—in all respects similar to that of *Kelly*—"was initiated without authority of law and must be regarded as *nil*." This ruling is based on a construction of the third section of the act of June 14, 1878. Said section provides:

That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry *under the homestead laws*, or by some other person under the provisions of this act. (20 Stat., 113.)

Construing this section said case proceeds: "I doubt not that Congress intended the third section of the act of 1878 to restrict the right of contest thereunder to certain species of claimants expressly named, to wit, homestead and timber culture claimants, and to them only upon the condition precedent that they file an application to enter the land themselves."

This ruling has been departed from in subsequent cases, although the case of *Buttery v. Sprout* has not been specifically overruled. In the case of *Satterlee v. Dibble* (2 L. D., 307), the successful contestant against a timber culture entry on the allegation of failure to comply with law, was awarded the preference right to enter under the act of May 14, 1880, although he never filed an application to enter the land. In the case of *Pierce v. Benson* (2 L. D., 319), where such contestant alleged that he had offered an application to enter at the hearing, and was told by the local officers that such application was unnecessary, it was held that "as he was allowed to contest without filing an application, and as he proved his allegation, he is entitled to a preferred right of entry." It certainly cannot be urged that such contestant who files a declaratory statement is in any worse condition than one who fails to file any application to appropriate the land. The strictest rule that could be invoked against him is one that would treat the declaratory statement as mere surplusage. It is therefore clear under rulings of the Department, above quoted, and subsequent to the *Buttery* case, that the contestant in the case at bar is entitled to the preference right of entry. In other words, it is not a "condition precedent" to the right of contest that such contestant must apply to enter the land under the homestead or timber culture law.

But further, the ruling in said case of *Buttery v. Sprout* as to the scope of the term "homestead laws" is opposed to the construction of that phrase by this Department in similar instances. In the case of *George S. Bishop* (1 L. D., 95), it was held that the term "homestead laws" in section 2, act of June 15, 1880 (21 Stat., 237) was used in a

generic sense, and that an intervening timber culture entry, or pre-emption filing, if followed by entry, would defeat the right of purchase under that act. Indeed, to hold otherwise would be to deter pre-emptors or timber culture entrymen from seeking to acquire title to any tract of land that had been covered by a homestead entry made prior to June 15, 1880. This ruling has been steadily followed and is again announced in the case of Charles C. Martin (3 L. D., 373). In the case of Fraser *v.* Ringold it was held that said term would embrace a desert land entry. (3 L. D., 69.) The rulings of the Department on this question should be reconciled, and made consistent. To follow the ruling in Buttery *v.* Sprout is to say that Congress intended to suspend the action of the pre-emption law as to all tracts covered by timber culture entries, where the entryman had failed to comply with the law. There is certainly no reason for such action in the nature of the entry, or the contest, or the pre-emption law itself, nor do the words of the statute disclose any intention to interfere with the operation of that law. To secure harmony in the rulings of this Department, and to maintain the integrity of the land law system—for all such laws are construed *in pari materia*—I find it consistent to hold that the term “homestead laws” in the statute in question was used in a generic sense, and will embrace the pre-emption law.

It is in the interest of good administration of the land laws that abandoned entries should be canceled, and the land covered thereby thrown open to entry to others. Contestants are favored by law, and contests encouraged by the Land Department. It is incongruous to suppose that in the case of an abandoned timber culture entry, Congress departed from this evident policy, unless some reason can be assigned. Said decision is reversed, the entry will be canceled, and the declaratory statement allowed to go to record. The case of Buttery *v.* Sprout, in so far as it conflicts herewith, is hereby overruled. I am satisfied that no confusion in the practice can arise from this action, nor will harm be done to any party to a contest.

RAILROAD GRANT—ACCEPTANCE OF CONDITIONS.

NEW ORLEANS & PAC. R. R. Co.

It is the duty of the Secretary of the Interior to issue patents to said Company whenever they have filed in the Department satisfactory evidence of full compliance with the act of February 8, 1887.

Acting Secretary Muldrow to F. A. Babcock, New York City, April 23, 1887.

I have considered your petition in the matter of the New Orleans and Pacific Railroad Company, as assignee of the Baton Rouge and Vicksburg Railroad Company's land grant, asking this Department to refuse to issue any further patents to the New Orleans Pacific Railroad

Company until the determination of an action brought by yourself against the New Orleans, Baton Rouge and Vicksburg Railroad Company, and others, or until the New Orleans Pacific Railroad Company shall surrender and deliver unto yourself a certain number of first mortgage bonds secured by the land grant heretofore conveyed to the New Orleans Pacific Road by the New Orleans, Baton Rouge and Vicksburg Railroad Company, for and in lieu of, and as a discharge of an obligation heretofore imposed upon the New Orleans, Baton Rouge and Vicksburg Company.

The third section of the act of February 8, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes," provides—

That the relinquishment of the lands and the confirmation of the grant provided for in the second section of this act are made and shall take effect whenever the Secretary of the Interior is notified that said New Orleans Pacific Railroad Company, through the action of a majority of its stockholders, has accepted the provisions of this act, and is satisfied that said company has accepted and agreed to discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge and Vicksburg Railroad Company by act of March third, eighteen hundred and seventy-one, entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes.'

I have now to advise you that the New Orleans Pacific Railroad Company have filed in the Department a certified copy of a resolution passed by a majority of the stockholders of said company, at a meeting called for the purpose of accepting the provisions of said act of March 3, 1871, in the following terms, to wit:

Be it resolved by this meeting, representing sixty-seven thousand shares of stock out of the sixty-seven thousand and two hundred shares issued and outstanding, that the above resolution be, and the same hereby is, in all things ratified and confirmed; that this company does hereby accept the provisions of said act of Congress of February 8, 1887; and also accepts and will discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge and Vicksburg Company by said act of Congress of March 3, 1871.

Resolved, that the said board of directors are hereby authorized and directed to adopt any and all resolutions, and the President and Secretary of this Company to execute any and all instruments, under corporate seal or otherwise, necessary to complete, consummate or evidence such acceptance of said act of February 8, 1887, and to execute any instruments required or needful, whereby this company agrees to discharge all duties and obligations imposed upon the New Orleans, Baton Rouge & Vicksburg Railroad Company by said act of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes."

Considering that it is the duty of the Secretary of the Interior to issue patents to said company whenever they have filed in the Department satisfactory evidence of full compliance with the act of February 8, 1887, I must decline to grant your application.

DESERT ENTRY—TIMBER LAND.

RIGGAN v. RILEY.

A tract embracing several acres of timber is not subject to desert entry though the land will not produce an agricultural crop without irrigation.

Acting Secretary Muldrow to Commissioner Sparks, April 12, 1887.

I have considered the case of James M. Riggan v. William T. Riley, as presented by the appeal of the former from the decision of your office, dated March 31, 1885, dismissing his contest against the latter's desert land entry No. 72, made January 7, 1881, at the Boise City land office, in the Territory of Idaho, upon unsurveyed land, containing 462.57 acres.

The record shows that the township plat of survey was filed in the local land office on March 9, 1883, and said entry was adjusted by the register and receiver to cover the W. $\frac{1}{2}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 5, T. 2 N., R. 18 E.

On June 22, 1883, Riggan filed his affidavit of contest, duly corroborated, in which he alleged that he was a "bona fide" settler upon the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 4, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5, in said township; that he offered to file a pre-emption declaratory statement upon said tract, alleging settlement May 6, 1881, which was rejected by the local land officers on account of conflict with said desert land entry; that since his said settlement he has made valuable improvements upon said tracts and has continued to reside thereon with his family; that said entry was not made in good faith to reclaim the land, but for speculative purposes; that the land in controversy is non-desert in character, and a great part of it covered with timber and grasses, and that the entryman has already alienated the land covered by said entry.

It also appears from the decision of the local land officers that one A. M. Purdam made a similar allegation against said entry, and claiming for himself said tract in Sec. 5. Your office, on August 31, 1883, directed the local land officers to order a hearing to determine the character of the land and the good faith of the entryman in the premises.

The hearing was duly had, both parties being present in person and represented by counsel.

It appears that after said hearing had commenced, Riley relinquished all claim to the tract in Section 5, and the contest so far as Purdam was concerned was dismissed by the local land officers, and the case proceeded upon the allegations made by Riggan, as aforesaid. From the testimony submitted, the register and receiver found that the land was desert land in character; that it will not produce crops in paying quantities without artificial irrigation; that the adjustment of said entry so changed the location on the west side as to include some timber lands; that there are a few cottonwood trees growing along the western edge of said lands, where the lands approach the river; that

this fact is shown by a preponderance of the evidence, and it is corroborated by the personal observation of the local land officers, made while passing along the public road near said land; that said entry was made in good faith and not for speculative purposes, and that the contest should be dismissed. Your office, on March 31, 1835, affirmed the action of the local land officers, and held that "it appears from the evidence that the entryman has acted in perfect good faith in the matter of the reclamation of the land embraced in his entry."

This record has been carefully examined. The testimony is exceedingly voluminous, covering about fifteen hundred pages, a large portion of which is quite irrelevant, and many of the statements wholly irreconcilable. The evidence shows that said entry was made upon unsurveyed land, along Wood River, as above stated, and that some months after, but prior to survey, said Riggan settled upon the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 4, made valuable improvements thereon and has continuously resided upon the land to the date of said hearing. While a large number of witnesses were examined in the case and their testimony upon many material points is directly in conflict, yet a careful examination of the whole evidence shows by a fair preponderance that the south forty in dispute is timber land, and therefore not subject to entry under said desert land act. The witnesses for the contestant estimate the number of acres upon which there are timber trees to be from fifteen to thirty-five acres, and the size of the trees from two to three feet in diameter and forty to sixty feet in height. The testimony of the contestee shows that there are some trees on both forties in dispute, but he claims that the growth is scrubby and does not exceed one acre on the north forty and five acres on the south forty in controversy. Other witnesses for the contestee state that there are from two or three acres of timber on the north forty and from eight to ten acres on the south forty.

Section second of the desert land act, approved March 3, 1877 (19 Stat., 377), provides "that all lands exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act."

It is clear that, even if it be shown that the land will not produce some agricultural crop without irrigation, yet, if the testimony shows that there are several acres of timber on the land, such land can not be entered under said act.

But there is another element in the case that requires careful and serious consideration. It appears that on June 7, 1882, said Riley, with four others, entered into an agreement with the Idaho and Oregon Land Improvement Company, by which, for and in consideration of the sum of four thousand dollars to them in hand paid by said company, the receipt thereof being duly acknowledged, and in consideration of the further sum of six thousand dollars, to be paid as stipulated in said agreement,

and ten thousand dollars of non-assessable stock, to be paid to said parties within sixty days after the date of said agreement by said company to the said parties of the first part, "have leased, demised, and to forever let, and by these presents do lease, demise and to farm let unto the said party of the second part and to its successors and assigns, all the following described lands and premises, situate in the county of Alturas, Territory of Idaho, bounded and described as follows:" The description embraces the desert land entry No. 71 of Eben S. Chase, one of said parties, containing 455.33 acres, the desert land entry No. 64 of John Hailey, containing 484.87 acres; the desert land entry No. 72 now in controversy, containing 462.57 acres, and the desert land entry No. 66 of F. P. Cavanagh, containing 469 acres—making a total of 1,871.77 acres.

* * * * *

It is evident that said agreement is in effect an assignment of the interest of each of said parties in said entries to said company, and, if fully executed, the company would obtain title to more than eighteen hundred acres of land. It has been uniformly held by this Department that assignments made since April 15, 1880, will not be recognized, and those entries made prior to said date, which have been assigned, cannot be confirmed for a larger amount than six hundred and forty acres. See case of S. W. Downey (2 C. L. L., 1381); Joab Lawrence (2 L. D., 22); David B. Dole (3 L. D., 214); Stanton v. Durbin (4 L. D., 445); Peter French *et al.* (5 L. D., 19); Henry W. Fuss (*ibid.*, 167).

It is alleged that your office, on March 21, 1881, in response to a telegram from the register of said office, at Boise City, advised him that any person having initiated a desert land entry by making first payment can lease the same with an agreement to sell after patent is obtained from the government, without jeopardizing his own title, and that said agreement was made in pursuance of said advice. It is to be observed, however, that the agreement was made more than a year subsequent to the receipt of said instruction and went far beyond it.

It does not appear that Riley had made any effort to reclaim said claim, nor is it shown that any of said parties advised your office of the terms of said agreement prior to its execution, and it cannot be presumed that it was the intention of your office to change the settled ruling of the Department and allow parties to do indirectly what they could not do directly.

Aside from the evidence tending to show that the tracts in controversy were not subject to desert land entry, a careful consideration of the whole record shows that the whole entry is illegal and should be canceled.

Your attention is called to the fact that an inspection of the records of your office shows that said entry has not been posted upon the tract book of your office. The better practice would seem to be to post said entry on the tract book and note thereon the contest that is made against it.

The decision of your office dismissing said contest is reversed, and you will cause said entry to be canceled.

On July 12, 1886, your office transmitted to this Department for consideration in this case the report of a special agent of your office, relative to the validity of said entry. Said report contains no new evidence, and its recommendation has not been considered in arriving at the conclusion herein.

SWAMP LAND—MANNER OF SELECTION.

STATE OF LOUISIANA. (ON REVIEW.)

Acting Secretary Muldrow to Commissioner Sparks, April 14, 1887.

* * * * *

From the foregoing it is clear that the State elected to make the field notes of survey the basis of the adjustment of both of said grants. Indeed as appears in the quotation from the argument of counsel (page 9) in said decision of March 25, 1887, "the field notes made by the United States deputy surveyor *were agreed upon as the basis* as being a substantial compliance with the law," and it would seem that the State, after the lapse of nearly forty years, is estopped from denying such election, if she were so disposed.

The two letters referred to (*supra*) were not before this Department when said decision was rendered, and hence it did not clearly appear that the State had made the election as above indicated.

But since the State has already made said election, it will be unnecessary to call upon her to elect anew "whether the field notes of survey shall be made the basis of the final adjustment of said grants," and to that extent said decision (of March 25th) is hereby modified.

PRACTICE—APPEAL—CERTIORARI.

C. N. NELSON LUMBER CO.

An appeal filed by a transferee before notice of the decision was served on the entryman, was in time under the rules of practice.

Acting Secretary Muldrow to Commissioner Sparks, April 23, 1887.

The C. N. Nelson Lumber Company has filed an application for certiorari under rules of practice 83 and 84, in the matter of pre-emption cash entry No. 3787 of Stephen Pennington of the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 30, and the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 31, T. 59, R. 18, Duluth, Minnesota.

From this application and accompanying exhibits the following alleged facts appear: Said entry was made October 16, 1882, and upon evidence taken at a hearing subsequently had was held for cancellation by your office on the 31st of August 1883. April 14, 1884, Messrs. Curtis & Burdett, of this city, addressed a communication to your office,

setting forth that they represented "certain parties, who, as innocent purchasers in good faith," bought the land after entry made, that said purchasers were not parties to the hearing theretofore had, and requesting an opportunity to be heard as intervenors, etc.

More than two years thereafter, to wit: August 14, 1886, your office, referring to said communication of April 14, 1884, informed said attorneys "that you do not state for whom you appear, as required by the rules of practice," and on the same day again held said entry for cancellation. November 14, 1886, said attorneys, referring to your said letter of August 14th preceding, addressed to them, informed your office that in this case they appeared for the C. N. Nelson Lumber Co., of St. Paul, Minnesota, "innocent purchasers of the land in question." November 9th, same year, your office informed said attorneys that said entry had been held for cancellation August 14, 1886, as aforesaid. Thereupon, on the 12th of the same month, an appeal from said order of cancellation was filed on behalf of said purchasers, which was denied by your office March 5, 1887, on the ground that said appeal was not filed within the sixty days allowed by law. Upon motion for review of said last decision, accompanied by a formal application of said company to intervene, filed March 22, 1887, your office, on the 30th of March, 1887, adhered to its former decision, declining to transmit said appeal. Hence the present application.

It is alleged by applicants that notice of your decision, dated August 14, 1886, holding said entry for cancellation, was not served by the local office on the entryman himself, or upon any one for him, until some time in December, 1886, which allegation appears to be admitted by your office. It would seem that the appeal of the transferee who claims under said entryman, having been filed *before* said entryman was notified of the decision holding his entry for cancellation, was clearly in time under the rules, and should not have been dismissed.

If the allegations in this petition be true, it would appear that the applicant is entitled to the relief prayed for. You will therefore please transmit the record of the case to this Department, and in the meantime suspend further action therein until further advised.

PRACTICE—RULE 48—IRREGULARITY.

HARRIS *v.* MAYNE.

The refusal of the entryman to answer, on cross-examination, questions pertinent to the issue, is such an irregularity as to warrant the General Land Office in a re-examination of the case though no appeal was taken from the decision of the local office.

Acting Secretary Muldrow to Commissioner Sparks, April 23, 1887.

I have considered the case of Albert G. Harris *v.* William W. Mayne, involving the NW. $\frac{1}{4}$ of Sec. 1, T. 110 N., R. 63 W., Huron, Dakota Territory.

It appears that on June 26, 1880, Mayne filed soldier's homestead declaratory statement for the NW. $\frac{1}{4}$ of Sec. 33, T. 111, R. 62, then in the Mitchell, but now in the Huron land district; on January 7, 1881, he made homestead entry thereof, and having made final proof on February 1, 1882, received final homestead certificate therefor, being allowed a credit for his military services sufficient, with actual residence upon the land, to make up the five years required. On December 7, 1881, nearly two months prior to the last date, he filed another soldier's homestead declaratory statement for the NW. $\frac{1}{4}$ of Sec. 1, T. 110 N., R. 63 W. the tract involved in this case. On February 12, 1882, he also filed pre-emption declaratory statement for the same tract, claiming settlement thereon three days before, and on November 22, 1882, he made final proof and cash entry thereon, receiving final certificate the same day.

On December 26, 1883, Harris filed an affidavit in the local office, setting forth that Mayne was not a qualified pre-emptor at the time he entered said last described tract, and could not lawfully prove up on the same, because he had a soldier's declaratory statement on each of said tracts at the same time; that at the time of making the filing on the second tract he had not proved up on the first, and that he moved from land of his own—the homestead—to reside upon said pre-emption claim.

This affidavit being transmitted to your office, on February 4, 1884, a hearing was ordered "to determine the validity of" said cash entry. In the notice of this hearing, served upon Mayne, the charges were stated to be that the said pre-emption cash entry "was perfected through fraud and in violation of law, in that you were holding a homestead upon the NW. $\frac{1}{4}$ of Sec. 33—111—63, at the time of making settlement upon said NW. $\frac{1}{4}$ of 1—110—63; that you were not a qualified pre-emptor at the time of entering said tract; that you had a soldier's declaratory statement on each of said tracts, which is fraudulent, and that you failed to establish and maintain a *bona fide* residence upon said NW. $\frac{1}{4}$ of Sec. 1, as required by law." Hearing was had on April 18, 1884, both parties being present in person and by attorneys, with a number of witnesses.

Testimony was offered by contestant to prove that Mayne had placed a second soldier's declaratory statement on the second tract before he completed final proof on the first; and that he had after receiving certificate for the first tract removed therefrom to the second in violation of law, but no evidence was then introduced to prove that Mayne had not after settlement complied with the requirements of law as to residence and improvement on his pre-emption claim.

The defendant by his testimony sought to show that he had enlisted twice in the army, had been twice discharged, that because of the two discharges possessed by him, he thought and was advised that he was entitled to file two soldier's declaratory statements for the two tracts;

that in point of fact he made final proof on January 14, 1882, though said final proof was not approved and certificate issued by the register and receiver until February 1, 1882; that he left the homestead tract on January 16, 1882, and moved into a house in the town of Huron, which he rented on the same day he made first final proof, paying rent for one month in advance; that this was done when he found he was unable to farm, because of bad health and wounds; and having formerly been a minstrel he had made an arrangement with other parties to organize a minstrel troupe and travel; that such troupe was organized, gave exhibitions in Mitchell, Alexander, Park, Croton and Sioux Falls, and then disbanded, having been in existence about two weeks.

In his own testimony Mayne stated that when he left the homestead tract he had no intention of returning to it; in fact, he says that he left in consequence of a previous arrangement to organize the minstrel troupe, and that his purpose was to sell said tract; but does not say whether said agreement was made prior or subsequent to making final proof thereon. He says, however, that his second soldier's declaratory statement was filed on the second tract after he had made application to make, but before he had made, final proof on the homestead tract; that he filed the second soldier's declaratory statement in order "to get a claim to sell it and make some money out of it, I had no idea of going on to settle it"; thought he had a right to do this as others had done before.

In his final proof on his pre-emption claim, Mayne and his witnesses testified that he settled on said tract on February 9, 1882, and that his residence had been "continuous" since. On cross-examination in this contest, he admitted that, during that so-called "continuous" residence, he had a rented house in the town of Huron and lived there "part of the time." On being pressed as to how much of the time he lived in town, or how long before the making of final proof he moved into town, he refused, under instruction from his attorney, to answer, on the ground that residence upon the pre-emption claim was not in controversy. He was pressed again and again, and some thirty questions, bearing on this point, were put to him and each one he declined to answer, so that no further information was obtained from him as to this matter. It was also in evidence that Mayne, after proof, left said claim, and had since sold the same and was now residing on his homestead claim, which had been largely improved.

On October 31, 1884, the register and receiver decided in favor of Mayne, basing their opinion entirely upon the failure of evidence to sustain the charge that he had left his homestead and moved to town for the purpose of evading the law, which prohibited the removal from land of his own to a pre-emption claim.

No appeal was taken from this decision, and the papers in the case were transmitted to your office, where, on July 31, 1885, after a review of the evidence, you were "of the opinion that said filing and entry

were not made within the intention of the pre-emption law, that is, for the purpose of making the same a home, but, on the contrary, merely as a speculation." And though no appeal was taken you reversed the judgment and held Mayne's cash entry for cancellation. A reconsideration of this decision was asked and denied, whereupon an appeal was taken; on which the case is now before me.

A letter from Ira A. Heath, of Wolsey, Dakota, states that he has purchased the land in controversy, that the reconsideration of your decision was asked for, and the present appeal taken by him.

It also appears that Harris, the contestant, is dead, though it is not stated when he died.

The reversal of your decision is asked, principally on the ground that the finding of the register and receiver, being one of fact, was conclusive in the absence of an appeal, under rule 48, unless for some of the prescribed reasons, none of which it is alleged existed.

In this I do not concur. The first reason for which you are authorized to reverse the findings of facts by the local officers is, "Where fraud or gross irregularity is suggested on the face of the papers." An inspection of the record shows a "gross irregularity" on the part of the claimant in refusing, on cross-examination, to answer questions proper and pertinent, going to the very foundation of the inquiry—his good faith in making said pre-emption entry. In your office letter ordering the hearing, it was stated that the investigation was sought in order "to determine the validity" of the cash entry. The inquiry was not restricted to the one point passed upon by the register and receiver, as to whether the party had moved from land of his own to reside upon the pre-emption claim; but, to determine "the validity of the cash entry" in any and every respect. The notice of contest served upon Mayne expressly stated that one of the charges made was that he had "failed to establish and maintain a *bona fide* residence upon said NW. $\frac{1}{4}$ of Sec. 1, as required by law." So that the questions asked the witness were directly pertinent to the matters to be inquired about and there was no excuse for his refusal to answer them. In the case of *Mann v. Huk* (3 L. D., 452), the testimony of witnesses, refusing to answer under similar circumstances on cross-examination, was entirely excluded from consideration, and the case decided on the other testimony in the case. It was there said, "It is not to be supposed that I will consider testimony taken under such circumstances as these, but rather that it should be discarded as unworthy of belief, because the protestant, speaking through the mouth of his attorney, was unwilling to submit his witnesses and himself to the test of a cross-examination." In this case, as was done in that, the testimony of the recusant witness should have been discarded. This "gross irregularity" being shown by the record, you had a right to look further and see whether or not it affected the determination arrived at. An examination of the decision of the local officers shows that they gave full credit to the testimony of Mayne and

base their decision almost entirely thereon. Nor do they in the remotest way allude to the "gross irregularity" attending the taking of that testimony. It is true there is the testimony of other witnesses tending to show the removal of Mayne's family from the homestead in the middle of January, 1882, the renting of the house in Huron for one month, the organization of the minstrel troupe and its brief existence, but none of this testimony would justify the register and receiver in reaching the conclusion arrived at without considering the testimony of Mayne. His testimony, under the circumstances, they should not have considered, because of this "gross irregularity," and it was proper for you to go behind their finding of facts and determine the case upon all the evidence.

But in addition to this it is to be recollected that the government is a party to this contest. Harris having failed to appeal, any rights he might have acquired, by a decision in his favor, were entirely eliminated, and the case thus became one between the government and the entryman, and it was your duty to examine the whole record carefully with a view to the protection of the interests of the United States. Rule 48 does not pretend to and could not prevent such examination. That rule is intended to and does relate entirely to a determination of the rights of the contesting parties, and does not deprive your office of its necessary supervision in the interest of the government. In this view your action in going behind the findings of the register and receiver was also correct and is approved.

Upon a careful examination and consideration of the whole case, I am satisfied that said pre-emption claim was speculative in its inception, fraudulent in its attempted consummation, and without the shadow of good faith in any of its phases—the whole transaction being a thinly disguised attempt to obtain government land under the merest pretense and semblance of compliance with the requirements of law.

I therefore affirm your judgment, and direct the cancellation of said cash entry.

: — —

PRACTICE—MORTGAGEE—NOTICE.

AMERICAN INVESTMENT CO.

An assignee or mortgagee may file in the local office, under oath, a statement showing his interest in a pending entry, and have the same noted of record, and thereafter he will be entitled to notice of any adverse action on said entry.

Acting Secretary Muldrow to Commissioner Sparks, April 26, 1887.

I am in receipt of a communication from George L. Beckett, esq., of April 9, 1887, relative to the right of assignees and mortgagees to have their names noted on the records of the local office in cases in which they are interested, their object being to facilitate the supplying of defects and to supply to the local officers information as to their interests,

so they may receive notice in all cases where entries in which they are interested may be held for cancellation.

Enclosed with said letter are copies of the following letters, to wit: From George L. Beckett to Commissioner, of January 9, 1887. From Assistant Commissioner to George L. Beckett, of February 9, 1887. From George L. Beckett to register and receiver, Yankton, Dakota, of February 28, 1887. From Commissioner to register and receiver, Yankton, Dakota, of March 28, 1887; and from register, Yankton, Dakota, to George L. Beckett, of April 7, 1887—all of which, together with the letter of George L. Beckett first above referred to, are herewith transmitted.

In response to the letter from George L. Beckett, Esq., attorney for the American Investment Company, inquiring whether there "would be any impropriety in having the name of the American Investment Company noted on the land office records in cases where they are interested to remedy the failure of claimants to receive notice," the Assistant Commissioner, by letter of February 9, 1887, after noting that the Department having decided "that any party claiming under an entryman is entitled to receive notice of any adverse action taken in regard to his entry," said "there can be no impropriety in the name of the American Investment Company being noted on the local office records, in cases where said company is interested. In fact, to protect their rights, notice of their claims should be filed."

In compliance with the information contained in the letter of the Assistant Commissioner, the American Investment Company forwarded to the local office at Yankton, Dakota, a list of lands in that district in which they are interested.

Upon receiving this list, the register and receiver addressed a letter to your office making inquiry whether "it is the duty of the local officers to note on the records the names of mortgagees of unpatented lands, and if so, whether they are entitled to compensation therefor." Both of said questions you answered in the negative. Your answer to the first question seems to be predicated upon the view as expressed in your letter that the Department has not decided that "any party claiming under an entryman is entitled to receive notice of any adverse action taken in regard to his entry," but that assignees and mortgagees are only entitled to notice when they are parties to the record, and that "they can not become parties to the record by a mere statement verbal or written, that they claim under an entryman."

If a mortgagee or assignee, whose name is disclosed by the report of a special agent, is entitled to notice of proceedings had upon such report, I can see no reason why a party who himself discloses his interest might not be equally entitled to notice.

Rule 102, requiring that no person shall intervene in a case without disclosing under oath the nature of his interest, has reference to what, proof shall be required in the investigation of a case where an intervenor

is seeking to sustain the validity of an entry, but the production of proof is not necessary for the purpose of disclosing an interest in order to entitle them to notice of adverse action in any case in which they have an interest as assignee or mortgagee.

When an entryman has fully complied with the law and received certificate of entry, he can dispose of the land covered by his entry. A transfer of such right as the entryman may then possess gives to the assignee a right to be heard to sustain the validity of that entry, and hence he is entitled to be made a party to any proceeding involving the cancellation of said entry by disclosing under oath the nature of his interest. But an assignee or mortgagee should not be required to file either the original or certified copy of his mortgage or deed of assignment to entitle him to notice, because the action of your office might not be adverse to the entry, and in such case there would be no necessity to intervene. If the entry is held for cancellation, notice should always be given to an assignee or mortgagee, if the fact of such interest is known, who will then be allowed to intervene to sustain the validity of the entry by disclosing under oath the nature of their interest and making proof thereof as required by Rule 102.

Considering that it is the duty of the Department to facilitate the prosecution of the rights of parties, I can see no reason why a mortgagee or assignee may not be permitted to file under oath in the local office notice of his claim under any entry in order that he may be advised of any adverse action upon said entry and to protect his rights in the premises.

You will therefore allow the American Investment Company to file under oath in the local office notice of their interest in any entry pending in said office, but they should be required to state the character of such interest in each case, and the filing of the said notice should be noted on the records.

CONFLICTING SETTLEMENTS—JOINT ENTRY.

MILLER *v.* MILLER.

Joint entry allowed in case of conflicting settlement rights initiated prior to survey.

Acting Secretary Muldrow to Commissioner Sparks, April 23, 1887.

I have considered the case of Henry Miller *v.* Robert Miller, involving the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 28, T. 152 N., R. 61 W., Grand Forks, Dakota, as presented by the appeal of the last named from your decision, dated September 23, 1885, allowing joint entry under Section 2274 of the Revised Statutes, or, if the parties prefer, permitting Robert Miller, who has offered final pre-emption proof for land filed upon by him, including the tract in question, to make entry in accordance with his filing, after having entered into a written contract with Henry

Miller to convey to him that part of the tract in dispute which lies north of a furrow, which it appears was the agreed dividing line of their respective claims, pending government survey of the lands.

The case is fully and accurately presented by your decision and the facts need not here be recited.

There is no dispute as to the line between the two claims prior to survey. It was understood and agreed by both parties that the furrow above referred to should divide their claims until public survey, but what should thereafter constitute the dividing line is not so clear, and is made the issue in this contest. It is stated by both parties that the line of government survey should separate their claims. Henry avers, however, that the agreement was that the line of division should be the section line, while Robert is equally positive that it was to be the government line falling nearest the furrow, whether such line should be sectional or subdivisinal.

On this question hearing was had. The register and receiver, before whom the testimony was taken, and your office were unable to determine from the conflicting statements of the parties and their witnesses what the agreement, which was parol, had been, and therefore decided in favor of joint entry, or entry to Robert after contract as already indicated.

After a careful examination of the evidence, I am unable to arrive at a satisfactory conclusion as to the fact in issue, and therefore affirm your decision.

HOMESTEAD-ENTRY-CONTEST-ACT OF JUNE 15, 1880.

LYONS v. O'SHAUGHNESSY.

A contest instituted against the original entry suspends action upon a subsequent application to purchase under the second section of the act of June 15, 1880.

A contest terminating in an order of cancellation cuts off the right of purchase under said act.

Acting Secretary Muldrow to Commissioner Sparks, May 2, 1887.

I have considered the case of Gustus Lyons v. John W. O'Shaughnessy (now deceased) on appeal by each of the parties in interest from your decisions of June 16 and September 25, 1885.

John W. O'Shaughnessy departed this life on June 3, 1883, and his widow, Bridget O'Shaughnessy, appealed from your decision of June 16, 1885, holding for cancellation the homestead entry No. 4279 of her said husband on Lot 2, Sec. 5, T. 9 S., R. 2 E., New Orleans, Louisiana, land district.

Gustus Lyons appealed from your decision of September 25, 1885, permitting said Bridget to purchase said tract of land under the provisions of section two of the act of June 15, 1880.

It appears that on August 25, 1875, O'Shaughnessy made a homestead entry on said tract of land, and that on December 9, 1880, Lyons did the same, the register of the local land office certifying that there was then no prior valid adverse right to said land.

On September 13, 1882, O'Shaughnessy made the usual formal proof and obtained final homestead certificate. It appears from a report of the register and receiver, dated March 26, 1885, to the Commissioner of the General Land Office, that Lyons executed a contest affidavit on November 18, 1882, alleging abandonment of said land by O'Shaughnessy. It is inferred that this affidavit was in some respect defective, or that evidence to corroborate the facts stated in it was required.

On April 1, 1884, a new affidavit of contest, alleging the same grounds as the former one, was made by Lyons, and this was accompanied by additional corroborative testimony and was transmitted to the Commissioner of the General Land Office.

Under instructions from the Commissioner, of May 6, 1884, a hearing was had before the register and receiver, who, on March 25, 1885, found that the allegation of abandonment had been clearly proven and recommended that said entry of O'Shaughnessy's be canceled. On application of the contestee a rehearing was obtained and on April 24, 1885, the register and receiver adhered to their former decision.

Appeal was subsequently taken to the Commissioner of the General Land Office, who, on June 16, 1885, sustained and approved the finding and recommendation of the register and receiver, and ordered, subject to right of appeal, etc., that said entry be canceled. From this decision the present appeal of the contestee was taken on July 18, 1885. On the 28th of the same month the register of the local land office transmitted to the Commissioner of the General Land Office an application of the said Bridget O'Shaughnessy to purchase said tract of land under the provisions of the second section of the act of June 15, 1880, and submitted said application for further instructions. On September 25th following the application was returned to the register and receiver with instructions to them to allow the said widow to purchase, and on the 29th of the same month the money was paid and a certificate of purchase made out and signed by the register (but not delivered) to said Bridget O'Shaughnessy for said tract of land. The following November the contestant Lyons took his appeal from the decision of September 25th, allowing said cash entry, and the whole case is now before me.

The testimony of the several witnesses taken in the contest before the register and receiver satisfactorily shows that, if O'Shaughnessy ever went upon the land in controversy for the purpose of actual settlement and cultivation, or ever established in good faith a residence thereon, of which fact the testimony leaves me in grave doubt, he abandoned such residence in September or October, 1879. The evidence shows clearly that he left the premises about that time and never returned, under any pretense of residence, afterwards. This evidence consequently also

shows, that a material part of the testimony given by O'Shaughnessy and his two witnesses, when he obtained his final certificate No. 1502, which was on September 13, 1882, was false and, as far as O'Shaughnessy was concerned, fraudulent. Your decision of June 16, 1885, holding for cancellation said homestead entry No. 4279 is therefore affirmed.

Mrs. O'Shaughnessy should not have been permitted to make cash entry while the contest instituted by Lyons was still pending and undetermined. (See *Freise v. Hobson*, 4 L. D., 580.)

It satisfactorily appears from the evidence in the case that the contestant Gustus Lyons, some time during the winter of 1880 and 1881, moved with his family on to, and took possession of the land in controversy, and that up to the time hearing was had in the aforesaid contest case he had continuously resided upon and cultivated the same; that during all this time his possession of said land was open, notorious, exclusive, and undisturbed, and that he has during this time made valuable improvements thereon. Lyons has now also successfully contested and procured a final order for the cancellation of the O'Shaughnessy entry. Under these circumstances, section two of the act of June 15, 1880, confers no right on Mrs. O'Shaughnessy to make a cash entry on the land in controversy, and to permit her to do so was error.

Said cash entry is held to have been invalid, and is ordered to be canceled.

HOMESTEAD ENTRY—COMMUTATION—RECONSIDERATION.

THOMAS NASH.

In the absence of fraud new final proof may be submitted within the lifetime of the original entry.

An application for reconsideration should be acted upon without prejudice to rights recognized by the first decision.

Acting Secretary Muldrow to Commissioner Sparks, May 2, 1887.

I have considered the appeal of Thomas Nash from your decision of November 12, 1885, holding for cancellation his cash and homestead entry on the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 9 and the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 10, T. 153 N., R. 65 W., Devils Lake, Dakota Territory.

It appears that Nash made H. E. November 2, 1883, on said tract and final proof October 1, 1884, and received cash entry certificate November 14, 1884.

On July 11, 1885, you found that this failure to make payment at time of proof was an irregularity and also that only one of the advertised witnesses testified on final proof, the other witness being another party. Holding this latter defect to be fatal, without passing upon the sufficiency of the proof, you rejected the same and allowed Nash sixty days in which to make new proof, failing in which his entry would be canceled. On September 17, 1885, Nash asked a reconsideration of

your former action ; submitted his own affidavit showing the unavoidable absence of the advertised witnesses and forwarded the testimony of Eugene Coleman, one of them.

On November 12, 1885, considering this application of Nash, the affidavit of Coleman, and also the further fact that H. C. North, of this city, had filed in your office the duplicate receipt for Nash's cash entry, which receipt appeared to have been recorded in the office of the recorder of deeds, of Ramsey county, Dakota, on same day certificate was issued, you were of the opinion that claimant had "attempted to perpetrate a fraud," and you held his cash and homestead entry for cancellation.

On his appeal Nash has filed his own affidavit and those of all the advertised witnesses for the purpose of showing the cause of their absence on the appointed day ; and also for the purpose of showing his entire good faith in the premises. In determining the case I have not thought proper to consider these affidavits.

I approve your action of July 2, 1885, suspending the entry and rejecting the proof therein, because the testimony submitted was not that of two witnesses whose names had been advertised, but of one advertised and one substituted witness. See case of Frances M. Cull, 5 L. D., 348.

But inasmuch as no fraud was then found by you, the entryman was entitled to submit proof anew at any time during the lifetime of his entry and should not have been restricted to sixty days, as was done. See Henry B. May's case, 4 L. D., 557.

The claimant also had a right to ask for a reconsideration of your said decision, which it thus appears was erroneous, and his application should have been acted upon, without prejudice to his rights under the first decision.

I see nothing in the papers with which he accompanied that application to show fraud in connection with his entry or the making of his proof. He did that which, under a misapprehension of the law, and bad advice, he thought was right; and which the register and receiver approved, which approval was not obtained from them through any deception or misrepresentation. Nor does the fact that his duplicate receipt was recorded the same day necessarily, of itself, militate against his good faith. If he had sold the land on that day, he would only have done that which in the case of *Myers v. Croft* (13 Wall., 295), the supreme court said was a proper transaction not prohibited by law. That such sale or a mortgage of the property had been made did not then appear.

On a careful consideration of the case I reverse your action holding said entries for cancellation, suspend the cash entry, reject the final proof submitted and direct that the claimant be allowed further time and opportunity during the lifetime of said entry, within which to make proof anew, in accordance with law, showing compliance therewith.

FINAL PROOF—RES JUDICATA.

GEORGE A. BROCK.

An expression of opinion by the Commissioner of the General Land Office as to the validity of an entry pending before the local office is not such a decision as will preclude said Commissioner, or his successor, from a full examination of the case when reached in its regular order.

Acting Secretary Muldrow to Commissioner Sparks, May 5, 1887.

In the matter of George A. Brock's pre-emption cash entry the Commissioner of the General Land Office rejected the final proof, upon the ground that six months residence had not been proven, which decision was affirmed by the Department October 30, 1886, and claimant was required to make new proof within ninety days from notice of said decision.

A motion for review of said decision is made, upon the ground that final proof in said case was allowed by Commissioner McFarland July 31, 1883, which fact was not known to the Secretary when said decision of October 30, 1886, was rendered, and that the Commissioner has no power to review the action of his predecessor.

From this decision of July 31, 1883, above referred to, it appears that the register and receiver transmitted the final proof of Brock to the General Land Office without passing upon the same. The Commissioner returning the record to the local office said: "I think the entry should be allowed. The proof is herewith returned with directions to allow the same. In transmitting the entry, you are requested to file therewith your certificate of publication of notice omitted from the papers."

As all questions as to the sufficiency of final proof must be decided by the register and receiver before transmitting the same to the General Land Office, this expression as to the validity of the entry and the direction to the register and receiver is not such a final decision as to prevent the question from being considered by the same Commissioner or any succeeding Commissioner, when the case is subsequently transmitted by the register and receiver with their decision thereon. While Commissioner McFarland might have adhered to the view expressed by him in his letter of July 31, 1883, yet when the case was reached in its order after decision by the register and receiver it would have been acted upon as if no decision had been made thereon.

"The issuance of final certificate on the direction of the Commissioner of the General Land Office will not preclude his successor from ordering a hearing as to the merits of the claim while it is yet pending in his office." (Robert Hall *et al.*, 5 L. D., 174).

The motion is denied.

NOTICE BY PUBLICATION—POSTING—JURISDICTION.

KELLY v. GRAMENG.

Notice by publication includes posting of notice upon the land in contest, and if such posting is omitted the notice is incomplete, and jurisdiction is not acquired. The record must show affirmatively all matters of notice requisite to confer jurisdiction.

Acting Secretary Muldrow to Commissioner Sparks, May 5, 1887.

I have considered the case of John Kelly v. Fred. Grameng on appeal from your office decision, dated December 15, 1885, adverse to Grameng.

It appears that appellant on September 5, 1885, made homestead entry, No. 2096, on the SW. $\frac{1}{4}$ of Sec. 13, T. 32, R. 46, Valentine, Nebraska; that on the 16th of April, 1885, Kelly initiated contest against said entry charging abandonment; that hearing was ordered, the notice prescribing that the testimony be taken May 29, 1885, before H. T. Tingle, U. S. court commissioner, and requiring appearance at the local office June 3, 1885, to respond and furnish testimony concerning the alleged abandonment. Testimony was taken before the U. S. commissioner on the date first named. No testimony was offered in behalf of contestee.

The record thus made was duly transmitted to the local office, but action was not there taken in the case until September 23, 1885, when the contest was dismissed, the following endorsement being made in pencil by the receiver on the back of the affidavit of contest:

“Dismissed for the reason that contestant has furnished no evidence of posting notice on land—30 days time given contestant to appeal.”

Underneath this is the entry apparently made in a different hand—“Parties notified same day.”

No appeal having been filed, the local office, by letter of November 5, 1885, transmitted the papers to your office, which, upon inspection of the record, found that there was no evidence that notice of contest had been posted on the land.

Your office, however, proceeded to examine the testimony in the case, and concluded as a result of said examination that the claimant had abandoned the land, and that his entry should be canceled. From that decision claimant is now here on appeal, averring that on the day set for trial he made a special appearance and filed a motion to dismiss, for the reason that contestant did not submit proof that he complied with rule 14 of practice, in relation to posting notice upon the tract. He also refers to the fact of contestant's failure to appeal from the action of the local office.

I find among the papers an application, made by contestant December 10, 1885, under oath, and filed in your office December 18, 1885, three days after the decision appealed from was rendered, setting forth

that he did post the required notice on the tract about thirty days prior to the day of hearing, but that he had neglected to set out that fact in the testimony; also that he had no notice of the dismissal of the contest by the local office. On these statements he at the time of making them asked a review of the testimony or a new hearing.

To this your office replied by letter, dated January 7, 1886, to the register and receiver, that as the entry had been by letter of December 15, 1885, held for cancellation for abandonment, the consideration of said application for review and rehearing was unnecessary.

From the foregoing it appears that the sole question raised by the appeal under consideration is that of jurisdiction to decide the case on its merits under the charge of abandonment in the absence of evidence of complete notice, as required by the rules of practice, it being admitted by contestant that he omitted to furnish evidence of the posting of notice of contest upon the land in controversy, though he states, and furnishes corroborating affidavits, that he did as a matter of fact post the notice as required by the rules.

In my judgment your office erred in passing upon the testimony taken pursuant to the order for a hearing, it not appearing affirmatively that the local office erred in finding that there was no evidence of the posting of notice of contest upon the land.

Notice by publication includes the posting of notice upon the land in contest, and if such posting is omitted, the notice is incomplete. "The proper basis for an order of publication, the publication by advertisement, the sending of copy by registered letter, and the posting of copy on the land, are all constituent and essential parts of 'notice by publication'; and the absence of any one of these essentials makes inoperative the efficacy of the others, if the defect be not waived." *Parker v. Castle* (1 L. D., 84), and cases cited.

In this view of the question presented, your office was without jurisdiction to decide the case on the testimony submitted, it not appearing from the record that due and complete notice had been given. The ex-parte affidavits filed since the decision by the local office and your office (and without notice to contestee), to the effect that as a matter of fact a copy of the notice of contest was posted on the land as required by the rules, can not be accepted as completing the record so as to now give jurisdiction to pass upon the testimony.

The allegations and the facts in the case are such, however, as in my opinion to warrant a compliance with contestant's request that a rehearing be granted.

Your office decision is modified accordingly and you will direct that a new hearing be ordered, based upon the affidavit of contest already on file, after due notice as required by the rules of practice. Upon the record thus made the register and receiver will make their finding, subject to appeal as in other cases.

PRIVATE CLAIM—SUPERVISORY JURISDICTION.

LETTRIEUS ALRIO.

Ordinarily the supervisory authority of the Secretary should be invoked by appeal, but in case of a decision rendered without jurisdiction the irregularity may be corrected in a more summary manner.

The character of the claim being *res judicata*, and not in issue before the General Land Office, its decision thereon is without warrant and of no effect.

Acting Secretary Muldrow to Commissioner Sparks, May 5, 1887.

On the 11th of February last A. E. Sompayrac, by his counsel, Messrs. Denver and Zachry, of this city, filed in the Department an application invoking the supervisory authority of the Secretary of the Interior in the matter of the execution by you of departmental decision, dated September 17, 1886 (5 L. D., 158), involving the scrip claim of Lettrieus Alrio. This application was accompanied by your letter, dated February 4th last, addressed to said attorneys, in which you state that by decision dated January 31st preceding, you had declined to issue certificates of location on this claim under the general scrip act of June 2, 1858 (11 Stat., 294). The application alleges that since said departmental decision became final, you have concluded that the claim of Alrio is not a confirmed private land claim within the meaning of said general scrip act, and that acting upon such conclusion you have refused to sign and deliver scrip to said Sompayrac until that question can be decided by the Department on another appeal; that your said conclusion is not based upon any new facts in the case or upon any suspicion of fraud or irregularity, but solely upon a point of legal construction growing out of the record as considered by the Department when the former decision was rendered; that in this matter you are acting beyond your jurisdiction and are opening up a case which has become *res adjudicata*; and that because of "such a palpable wrong and evasion of duty" the supervisory authority of the Secretary is invoked.

February 12th these papers were referred to you for consideration and early report, and under date of February 21, you submitted a report in the matter, and the same has been considered in connection with the former record material to the question now in issue.

The main question in issue when the decision of September 17th last was rendered was as to which of two parties, to wit: Mrs. H. W. Reynolds and A. E. Sompayrac, was entitled to receive certificates of location on this Alrio claim. Mrs. Reynolds was claiming under and by virtue of certain proceedings having as an initial point the alleged sale of this claim by Alrio in 1837; and Sompayrac based his title upon the proceedings of a succession sale of the effects of the then deceased confirmee, had in 1882. Your office by decision of July 25, 1884 (3 L. D., 44), had refused to authenticate said scrip and deliver the same to Mrs. Reynolds, because of certain defects in her chain of title, and had de-

nied Sompayrac's claim because of the ruling in relation to succession sales in Louisiana, as found in the case of Joshua Garrett (7 C. L. O., 55). That decision was considered final as to Sompayrac, but not as to Mrs. Reynolds, and she did not appeal from it. Sompayrac, however, did appeal, and his appeal brought up the entire record in the case in so far as was necessary to establish a *prima facie* right to the scrip herein. His appeal was sustained, said "Garrett" case was overruled, and the whole record in the case was returned to you in order that you might render a final decision as to the respective rights of the two parties. Your said report shows that in accordance with the directions in said departmental decision you, on the 11th of October, 1886, rendered a decision denying the claim of Mrs. Reynolds in the premises and recognizing said Sompayrac as the legal representative of Lettricus Alrio, and therefore entitled to receive the scrip issued in satisfaction of the claim under consideration. It further appears that Mrs. Reynolds took no appeal from this last mentioned decision against her, and that the same has now become final. You further assign as a reason for your said decision of January 31st last, declining to authenticate said scrip and deliver it to A. E. Sompayrac, the fact that in the matter of the scrip claim of Elias Blunt, a claim, as you state, originally similar to that of Alrio, you, under date of January 11th last, rendered a decision adverse to the scrip applicants therein, holding that it was not a "private land claim" within the meaning of the third section of the general scrip act of 1858; and that as there are a number of cases in the same class and confirmed by the same act of Congress awaiting adjustment, it seemed "proper that they should receive equal treatment upon any issue common to all." And you suggest that in your opinion departmental decision of September 17, 1886, and yours of October 11, following, "were conclusive upon the questions of title to the inchoate claim of Alrio, as between Sompayrac and Mrs. Reynolds, but not conclusive of all questions between those parties and the United States." You further assert that you have not declined to carry said departmental decision into effect and are not evading duty as charged against you by counsel for petitioner, but that on the contrary your action in this matter is proper, legal and within the scope of your authority and jurisdiction; and you suggest therefore that the petitioner herein should seek his remedy by appeal from your said decision of January 31st last, instead of by the present application.

As already stated, the question upon which you have suspended the authentication and delivery of scrip to said Sompayrac in the case under consideration is whether the claim of Alrio is a "private land claim," within the meaning of the general scrip act of 1858. If that question has not been finally settled so far as the Department is concerned, then your position in this case is correct; but if that question has already been finally settled—has passed in *rem judicatam*—then, as a matter of course, your position in this case is untenable, and the

application of petitioner should be granted. That this question had been *considered* as finally settled for now more than six years, by your office, by the Department, and by all parties in the case, until your said decision of January 31st last, cannot be questioned.

On the 26th of February, 1881, your office, reviewing and revoking its former decision of April 15, 1880, which had held for cancellation the scrip issued by the surveyor-general of Louisiana November 2, 1876, on the claim under consideration, held as follows :

According to the best evidence obtainable by this office, and as set forth in my decision, this claim has never been *located* pursuant to law and instructions, nor satisfied in any manner.

As it had been neither located nor satisfied at the date of approval of the general scrip act of June 2, 1858, I am of the opinion, after due consideration of the phraseology of said act, that the legal representatives of the deceased confirmee are entitled to indemnity with certificates of location to the extent of the confirmation.

Here then is a decision of your office made upon careful consideration and mature deliberation holding that scrip should issue on this claim in favor of the legal representatives of the deceased confirmee, thus recognizing it as a confirmed *private land claim* within the meaning of the third section of the general scrip act of June 2, 1858; which decision not only stands unreversed in terms to-day, but has been followed, acted upon, and taken as the basis of all subsequent proceedings in the case until your said decision of January 31st last. This is clear from an examination of the records of your office. In the decision of July 25, 1884 (*supra*), I find the following paragraphs relative to this question: "It (the Alrio claim) was confirmed by the act approved May 24, 1828 (6 Stat., 382), and has not been located in place by the United States or otherwise satisfied." And again speaking of the scrip in question which had been issued in pursuance of said decision of February 26, 1881, *the same scrip which is now pending for authentication*, it is said: "Under date of March 9, 1881, you (the surveyor-general of Louisiana) prepared and transmitted new certificates of the same designations, upon the engraved form, which are pending for authentication *simply upon the question of the legal proprietorship therein*." Again, speaking of Mrs. Reynolds's alleged title, it is said, "There are links missing in the chain of title presented by Mrs. Reynolds; otherwise, the scrip in question might have been approved and delivered to her long since." In the departmental decision of September 17, 1886 (*supra*), this claim is spoken of as a "private land claim;" and again it was said therein, "It is conceded that the claim of Lettrieus Alrio has been confirmed, that it is yet unlocated, and that certificates of location under the act of 1858 are due to his legal representative."

It is thus seen that the question you now raise has been finally settled and is forever at rest here, in so far as the present case is concerned. After said departmental decision the only question left open for decision by you was as to which of the two claimants, Mrs. Reynolds or Som-

payrac was entitled to receive the scrip in this case; and when your decision of October 11, 1886 in favor of Sompayrac became final for want of appeal, there was nothing remaining in the case for you to adjudge. There remained simply the mere ministerial duty of signing the scrip and delivering it to said Sompayrac or his duly accredited agents or attorneys.

I agree with you in the general proposition of law, that cases of the same kind and character should receive equal treatment *upon any issue common to all*. But that question does not enter into this case; for here the issue that you seek to bring into the case, and which may possibly be in the other cases you mention that are not yet adjudicated, has been finally settled by former adjudications. It is in this case *res adjudicata*. It does not appear that any new evidence has been discovered, or that any fact now presents itself which was not in the record when the former adjudications were had; but simply that your attention has but recently been called to the case, and that in your opinion the former adjudications were erroneous. Admitting for the sake of the inquiry all that is stated in your behalf, I am still of opinion that your said decision of January 31st last was unwarranted, and is therefore null and void.

It is a principle of administrative practice which has been followed and acted upon in all the executive departments of the government during the entire period of its existence that in the absence of fraud or mistake, a matter finally settled by the head of a Department, acting within the scope of his authority and jurisdiction, is to be considered final so far as the executive is concerned, and is not afterward to be set aside or reopened. 2 Ops., 3; 13 ib., 387 and cited opinions; and 13 ib., 208.

Ordinarily, as suggested by you, an appeal would be the proper remedy to be employed to invoke the superior authority of the Secretary in any matter; but where a decision is rendered by your office without jurisdiction to adjudge, the irregularity may then be corrected in a more summary manner.

Without at present expressing any opinion on the merits of the question sought to be raised by you, and involved as you state in the "Blunt" case (*supra*), and entertaining the views hereinbefore stated at length, I am of the opinion that your said decision of January 31st last in this case was unwarranted and the same is hereby set aside, and you will authenticate the scrip in question and deliver it to said Sompayrac, or his duly accredited agents or attorneys.

RAMAGE v. CENTRAL PAC. R. R. CO.

Motion for review of decision rendered December 14, 1886 (5 L. D., 274), denied by Acting Secretary Muldrow, May 5, 1887.

PRIVATE LAND CLAIM—ACT JUNE 2, 1858.

ELIAS BLUNT.

claim to land in Florida and Louisiana, based upon occupation, habitation, and cultivation, under the former government in sovereignty over the country, is a private land claim, and included within the provisions of the third section of the act of June 2, 1858.

A title resting on such basis is of the same validity and efficacy as one founded on a written permission to settle, or order of survey, or as any incomplete title. In the case of a private claim owned by different parties where the interests therein are separate, divisible, and determinate, scrip may issue to any one of the owners to the amount of his determined interest therein.

Acting Secretary Muldrow to Commissioner Sparks, May 5, 1887.

The narrow strip of country in Louisiana adjacent to Texas, known as the "neutral territory," having been finally ceded to the United States by the treaty with Spain, of date February 22, 1819 (8 Stat., 252), Congress, on the 3d of March, 1823 (3 Stat., 756), passed an act providing for the examination of the titles and claims to land in that territory.

The first section of the act provided that said tract of country should be attached to the land district south of Red River; and the register and receiver of that district, among other things, were required:

To receive and record all evidences of claim, founded on occupation, habitation and cultivation, designating particularly the time and manner in which each tract was occupied, inhabited, or cultivated prior to, and on, the 22d of February, 1819, and the continuation thereof subsequent to that time, with the extent of the improvement on each tract, etc.

The second section provided:

That the register and receiver as aforesaid shall transmit to the Secretary of the Treasury a complete record of all the claims presented to them under this act, and the evidence appertaining to each claim, and shall also make out and transmit to the Secretary of the Treasury an abstract containing the whole number of claims in four distinct classes, the third class shall consist of claims founded on habitation, occupation, or cultivation, previous to the 22d of February, 1819, and the manner which would have entitled the claimants to a title under the government exercising the sovereign power over that tract of country, and which in their opinion ought to be confirmed, etc.

The act of May 26, 1824 (4 Stat., 65), is supplementary to the first mentioned act, merely extending the territorial jurisdiction of the register and receiver.

In the report of the register and receiver of the Southwestern District of Louisiana, dated at Opelousas, November 1, 1824, the claim of Elias Blunt, 3d class, No. 253, among others, was recommended for confirmation in the following language:

Elias Blunt, of the parish of St. Landry, assignee of Archibald Smith, filed his notice, claiming by virtue of inhabitation, occupation, and cul-

tivation, a tract of land situated on the west bank of the Quelqueshue river, at a place called Blunt's ferry, bounded below by William and George Smith, and containing six hundred and forty acres.

Then follows a resume of the evidence supporting the claim, and finally: "We are of opinion this claim ought to be confirmed; and in the abstract have classed it with claims of third class." American State Papers, Green's Ed., Vol. 4, pp. 71, 2 & 4.

By the act of Congress approved May 24, 1828 (6 Stat., 382), the claims in the third class above, (with a few express exceptions—that of Blunt not being among the exceptions,) were confirmed. This act was entitled "An act to confirm claims to land in the district between Rio Hondo and Sabine rivers, founded on habitation and cultivation;" and provided in the first section thereof: "That the claims to land founded on habitation and cultivation, contained in the third class of the report of said register and receiver be, and the same are hereby confirmed," etc. The second section provided:

That the confirmations made by this act shall not be construed to extend farther than to a relinquishment of title on the part of the United States, and the claims hereby confirmed shall be located under the direction of the register and receiver of the proper land office in conformity with the legal subdivisions of the public surveys, so far as practicable, and shall include the improvements of the claimants respectively.

In 1827, before the government surveys had been extended over the township in which this claim was situated, Elias Blunt sold his inchoate claim and land to the heirs of James Ashworth, deceased, for the sum of \$500. On the 28th of December, 1852, the claim was located under the direction of the register, and embraced parts of sections 23, 24, 25, 26, 35 and 36 in T. 9 S., R. 9 W., Western District of Louisiana, aggregating according to the township survey then in existence nearly six hundred and forty acres. It appears, however, that a large part of this location had been approved May 5, 1852, to the State of Louisiana as swamp and overflowed land under the grant to that State by the act of 1849. Accordingly a relocation of the claim was made by the register and receiver June 22, 1886, upon the former tracts not embraced in the State swamp selection, aggregating 221.23 acres, situated in sections 23, 24, 35, and 36, and August 21, 1886, patent was issued for such relocation under section 2447 of the U. S. Revised Statutes, and the same was subsequently delivered to the appellants in this case. On January 20, 1883, the whole claim as originally located (including the swamp selections) was sold at sheriff's sale in separate tracts as the result of a partition suit, Allen J. Perkins and William B. Norris purchasing the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of Sec. 26, which contained 163.28 acres. This tract having been approved to the State as aforesaid, Perkins and Norris, August 16, 1886, applied to the surveyor-general of Louisiana for indemnity certificates of location under the act of June 2, 1858 (11 Stat., 294), who, on the 21st of that month, denied the application on the ground that it was contrary to office practice to issue scrip for only a

portion of a claim, while any other portion also remained unsatisfied. Appeal was then taken, and you, by decision dated January 11, 1887, also rejected the application on two grounds: First, That the claim was not a private land claim within the meaning of the third section of the general scrip act of 1858, but only a donation; and Second, That even if it be a private land claim, indemnity certificates of location must be refused for the reason assigned by the surveyor-general. Appeal was then brought here and the case has been given a most careful consideration. Appellants have been heard orally and upon brief. This is a test case upon both points of objection raised by you against the issuance of scrip, and the decision herein will practically govern a number of other cases of like character.

Exception is taken to both grounds upon which your decision is based. The third section of the act of 1858, under the provisions of which relief is asked, concludes as follows:

That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions.

After quoting this part of the act of 1858 you say: "This claim can not be considered a private land claim," because "no claim to any *written* evidence of title or permission to settle is alleged. Therefore the confirmation is a *donation* by the United States government for six hundred and forty acres of land," etc. That is to say, you hold that there can be no private *land-claim* without written evidence alleged as the origin of the right. In this I think you err.

The act of March 3, 1823 (*supra*), contemplates no such distinction. It treats all claims in the first, second and third classes as "claims to land," arranging them in the several classes merely as a matter of convenience. It is careful to say, however, that no claim shall be included in any one of said classes that, in the opinion of the Commissioners, could not have ripened into a *perfect title* under the former government in sovereignty over this country, had not that sovereignty been transferred to the United States. Therefore the measure of the validity of the title is the laws, usages, and customs of this country under the Spanish government. The standard of right fixed to determine the validity—the legality of the claims—is found in those laws, usages and customs with reference to this territory.

Claim is defined as: "A demand as of right"—Worcester. The question for consideration thus becomes, had these claimants such a right under the foreign government as would have been recognized by it in case they had sought to perfect their titles. I think they had.

It is well settled that the term *grant* in the Louisiana and Florida treaties comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, settle or possess, *whether evidenced by writing or parol or presumed from possession*. *Strother v. Lucas* (12 Pet., 410, *Sanchez v. Gonzales* (11 Martin, 207), *Le Blanc v. Viator et al.* (3 La. Con'd, 830), *Landry v. Martin et al.* (15 La., 1), and *White's Recopilacion*, Vol. 2, pp. 228, 244 and 691. It is likewise well settled that under the laws, usages and customs above referred to these imperfect titles—*these claims*—were suffered by the government to descend by inheritance, were transferable by private bargain, either by written instrument or by parol, and when the case required were seized on execution and sold for the payment of debts. See authorities last cited. And the confirmatory act of 1828 relinquishes the Federal title, not solely because the claims were "founded on habitation and cultivation," but because also such "habitation and cultivation," as reported in the particular case, evidenced the fact that the claimant, had the sovereignty of Spain continued, "would have been entitled to a title under" that government, because such "habitation and cultivation" gave him under the laws, usages and customs of Spain an *inchoate* title, which was protected by the treaty of cession and the laws of nations.

A legislative confirmation of a *claim to land* is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the government. *Langdeau v. Hanes* (21 Wall., 521), *Slidell v. Grandjean* (111 U. S., 412). The acts of 1823 and of 1828 (*supra*) speak of these claims as "claims to land"—that is, "a demand as of right" to land; and they have always been so considered in the Land Department. To hold then that they are not "land claims" seems merely a play upon words and should not enter into judicial consideration. If "*land claims*," they must of necessity be "*private land claims*."

Your definition of a "private land claim" would seem to embrace any claim founded on *written* evidence of title. But I think it clearly established by the authorities heretofore cited that a title based on "occupation, habitation and cultivation," under the former government in sovereignty over this tract of country, was as valid and of as much efficacy as one based upon a written permission to settle, an order of survey, or as *any incomplete title*. I think it also clearly established by those same authorities that these claims were considered and treated as *private property*. Hence, when confirmed, they were *not donations* from this government, as that term is properly understood and applied. For a *donation* is in the nature of a gift, and is never predicated of any *right to demand* existing in the donee. It emanates in the generosity of the donor simply, and proceeds purely from bounty or gratitude.

It is "A transfer of the title to property to one who receives it without paying for it." (1 Bouv., 501).

Again, the whole legislation of Congress upon the subject of land claims in the Louisiana and Florida countries recognized and treated claims of the nature of these Rio Hondo claims as "private land claims," and considered them on the same footing as other claims based on written evidence of title. See the Missouri acts of July 9, 1832 (4 Stat., 565), March 2, 1833 (*id.*, 661), July 4, 1836 (5 *id.*, 136); June 2, 1858, 2d Sec. (*supra*), March 2, 1805 (2 *id.*, 324), April 21, 1806 (*id.*, 390), and March 3, 1807 (*id.*, 440).

Further, the records of your office and of this Department abundantly show that claims of this class have been universally considered as "private land claims" within the meaning of the general scrip act of 1858. They have never been considered as anything else. See particularly letter of Commissioner Drummond, of August 26, 1872 (Land Office Report for 1873, p. 41), in which, after an exhaustive review of the subject, he concluded that the settlement claims in the Greensburg district of Louisiana—claims inferior to the class here under consideration—were within the purview of said act of 1858. The records of your office also show that a number of Rio Hondo claims have been satisfied with indemnity scrip under the act of 1858. Even so late as September 17th last, the Department in the case of Lettricus Alrio (5 L. D., 158), considered a claim precisely like the one now under consideration in this particular as a "private land claim" within the meaning of the general scrip act. This question was then considered as so well settled that nothing more than a mere statement of the fact was deemed necessary to carry its conclusiveness.

"Whenever an act of Congress has, by actual decision, or by continued usage and practice, received a construction at the proper department, and that construction has been acted on for a succession of years, it must be a strong and palpable case of error and injustice that would justify a change in the interpretation to be given to it." 2 Opin., 558; 4 *id.*, 470, 10 *id.*, 55; *Barnard v. Ashley* (18 How., 43); *United States v. Philbrick* (120 U. S., 52, and cases cited therein). For the foregoing reasons, your decision upon the first question raised by the appeal is reversed.

This brings me to the consideration of the second exception to your decision, which is thus assigned :

You erred in denying to Allen J. Perkins and William B. Norris indemnity lands under the act of June 2, 1853, for a *determinate and determined part of a located* private land claim, which part had been adversely disposed of by the United States prior to June 2, 1858, on the ground that the owners of the other determinate and determined parts had not joined in the application for relief.

Your language on this branch of the case is as follows :

Persons who hold under the confirmee as assignees, devisees, or by operation of law, are legal representatives, and as such have an un-

divided interest in the claims; and hence scrip cannot issue for a part of the claim, but must issue for the whole quantity. The question of the division of the interests must be settled by the parties between themselves. Any transfer or assignment must, as the interests are undivided, be made by all the parties.

This rule of your office appears to have arisen in 1872, and was adopted apparently on the score of convenience, and because one passage in the act seemed to indicate such rule to be a correct one, viz: "A certificate of location for the quantity of land equal to that so confirmed and unsatisfied." But the act further says that the certificate shall issue "to the *claimant or his* legal representatives." Hence, if but *one* certificate for the whole amount is to issue in any particular claim, the same rigid rule of construction would limit its issue to claims presented by a *single claimant*. Whereas, as a matter of fact, many claims were presented to the Boards of Commissioners by two or more claimants claiming jointly. "It is a well settled proposition, that in legal parlance the *singular* embraces the *plural* and the *plural* the *singular*." Oregon Central Railroad Company (5 L. D., 549). Further, the present practice, as I understand it, is to issue this indemnity scrip in eighty acre pieces as nearly as practicable, the last piece to embody the fraction called for, if any, in the particular claim.

But the interests in a private land claim owned by two or more parties are not necessarily indivisible. One may own by purchase one-third of the claim, another one-half, and a third the remainder. Here the interests are separate, divisible and determined. And I can see no good reason on principle for refusing to any one of said three owners his determined share of scrip.

It appears to me also that this rule is capable of producing hardship, and will often defeat a statutory right; as in the particular case under consideration, where the owners of a determinate and determined portion of the claim, because they are unable to ascertain the owners of the remaining unsatisfied portion thereof, are refused scrip for that reason. This is clearly against the spirit of the remedial act of 1858, if indeed it is warranted by the strict letter of the statute, and is not founded in reason. A convenient rule of office practice ought not to be allowed to defeat a right. I can discover no harm that can result to the government from a change of this rule. The records of the surveyor-general's office, of the local land office, and of your office are surely sufficient guarantees against the issuance of scrip a second time in satisfaction of the claim.

The case of *United States v. Watkins et al.*, arising under the kindred act of June 21, 1860 (12 Stat., 85), is by analogy an authority on this point. In that case there had been a grant of 20,000 arpens of land by the Spanish Intendant to one Ramos, who three days after said grant conveyed the same to William Simpson and John Watkins in undivided moieties. After the passage of the act of 1860, the heirs of each of said grantees filed a petition in the U. S. district court as

provided by said act, praying for a confirmation of the claim and for indemnity lands for portions of said claim which had been disposed of by the United States under the general land law. The title of Simpson's heirs failed; but that of Watkins's heirs was held sufficient, and the court awarded them indemnity certificates of location for their share in said lands. In passing upon this question the court say:

The fact that Simpson and Watkins were tenants in common of undivided moieties in the land, can produce no inconvenience in making a decree in favor of Watkins's heirs for one-half of the amount of land in controversy. All, or nearly all, of it has been disposed of by the government, and the requisite amount of certificates of location can be awarded to them for their share therein. This they ask and it is equitable and just that they should have it. 97 U. S., 223.

To the same effect see *United States v. Davenport* (15 How., 1); *United States v. Patterson* (id., 10), and *United States v. Lynde* (11 Wall., 632). The court in all these cases proceeded on the fundamental principle of law that remedial statutes are to be liberally construed.

I think the true rule in relation to this matter should be that when an applicant for indemnity certificates of location shall show himself to be the owner of a determinate and determined portion of a confirmed and unsatisfied private land claim coming within the purview of the third section of the act of 1858, he should receive certificates of location for that part of said claim to which he shall show himself entitled. Under this rule, Perkins and Norris, the present applicants, are entitled to receive certificates of location for that portion of the original claim of Elias Blunt to which they are entitled. This interest is determined thus:

They purchased the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of Sec. 26, amounting to 163.28 acres, according to the corrected surveys. The lands embraced in the old location aggregated 692.83 acres; but of these, 221.23 acres have been patented to the claimants, leaving 471.60 acres of said location which were sold at the sheriff's sale aforesaid, but which went to the State, under the swamp land grant. The deficit due the claim however, is but 418.77 acres. The claimants, therefore, should receive scrip not to an amount equal to the exact area of the subdivision they purchased, but for an amount which will bear the same ratio to that subdivision as the exact deficit due the claim bears to the exact area of the subdivisions which went to the State as aforesaid. Hence, we have the proportions—471.60 A.: 418.77 A.: 163.28 A.: the requisite number of acres for which scrip should issue to said Perkins and Norris, or 144.99 acres.

You will therefore direct the United States surveyor-general for Louisiana to prepare certificates of location in the usual form to the amount of 144.99 acres, under said act of 1858, which, when so issued, you will approve and authenticate, and deliver to the claimants or their duly accredited agents or attorneys.

Your decision is reversed.

*PRACTICE—APPEAL; SETTLEMENT—ACT OF MAY 14, 1880.**WATTS v. FORSYTH.*

The second exception to rule 48 of practice is only applicable when it appears that the decision of the local office is "contrary to existing laws and regulations," as to rights between the claimant and the government, and not with respect to the preference rights of others.

Under the rules of practice now in force the right of appeal from a Commissioner's decision, affirming the local office, is lost by failure to appeal from the decision of the local office.

The settlement of a homesteader is protected by the act of May 14, 1880, as against other and later settlers for the period of three months only, after which the next settler in point of time, who has complied with the law, takes the land.

Acting Secretary Muldrow to Commissioner Sparks, May 7, 1887.

I have before me the application of Thomas Forsyth for certification of the record in the case between him and Francis Watts, which involves the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 33; S. $\frac{1}{2}$ and SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 34, T. 22 S., R. 143, Tucson, Arizona Territory.

From the copies of your office decisions accompanying the application the following facts appear:

The township plat was first filed February 22, 1877, and as amended, March 6, 1884.

November 6, 1884, Forsyth filed his pre-emption declaratory statement alleging settlement September 18, 1884, and on December 15, 1884, Watts made homestead entry. On the showing made by the parties, your office, February 16, 1885, ordered a hearing, which was had April 23, 1885, the local office finding in favor of Watts. From this decision Forsyth took no appeal, though it is now alleged that he instructed his attorney so to do.

August 13, 1886, your office, acting on the record before it, affirmed the decision of the local office and canceled Forsyth's filing.

Appeal having been filed from this last decision, your office held, November 11, 1886, that the right to be heard before the Department on appeal was lost through failure to appeal from the decision of the local office, whereupon this application was made.

It is conceded by the applicant that the decision of the local office under Rule 48 of practice became final as to the facts for want of appeal, but it is insisted that under the second clause of said rule your office erred in not reversing the local office, because its decision was "contrary to existing laws and regulations."

Rule 48 of rules of practice provides "In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case, and will be disturbed by the Commissioner only as follows:"

2. "Where the decision is contrary to existing laws and regulations."

It is under the second exception to the rule that applicant claims the right of appeal to the Department, notwithstanding his failure to appeal

from the adverse decision of the local office. This exception to the rule is only applicable when it appears that the decision of the local office is contrary to existing laws and regulations as to the right of the entryman to enter the land in question, considered solely with reference to rights between the government and the entryman, and not with reference to the preference rights of others. Because rule 48 should be construed with rule 81, as amended December 8, 1885 (4 L. D., 285), which provides that, "No appeal shall be had from the action of the Commissioner of the General Land Office, affirming the decision of the local officers, in any case where the parties adversely affected thereby shall have failed after due notice to appeal from such decision of said local officers."

Under the rules of practice now in force, it is very clear that Forsyth would be barred of his right of appeal to the Department by reason of his failure to appeal from the decision of the local office. But at the time of the decision of the local office, the amendment to rule 81 had not been promulgated, and under rule 48 his failure to appeal from the decision of the local officers only estopped him from denying the decision of the local officers as to their finding of facts, but did not deprive him of his right to have his case properly adjudicated, according to law upon the facts as determined by the local officers, and upon error committed therein by the Commissioner to have said error reviewed and corrected by the Secretary. The facts decided by the local officers were that the township plat was filed in the local office February 22, 1877, and refiled March 6, 1884. That Watts settled upon and commenced to improve the land in January, 1884, continuing thereon until the hearing, and filed homestead entry for said tract December 15, 1884. That Forsyth filed declaratory statement for said tract November 6, 1884, alleging settlement September 8, 1884, and that he is an actual settler and is complying with the law.

The failure to appeal from the decision of the local officers estopped Forsyth from controverting their finding of facts upon the testimony submitted, but the rights of parties upon the facts so found and presented is a pure question of law that the Commissioner should have properly determined, whether appeal had been taken or not, and Forsyth's right of appeal to the Department to have any error committed therein reviewed and corrected can not be questioned.

It will be noticed that Watts claims under a homestead entry, and Forsyth as a pre-emptor. If priority is accorded Watts, it must be by virtue of his settlement under the third section of the act of May 14, 1880 (21 Stat., 140), because Forsyth had settled and filed before Watts made entry. But the settlement of a homesteader is only protected by said statute as against other and later settlers for the period of three months, after which the next settler in point of time, who has complied with the law, takes the land. Section 2265 of the Revised Statutes. The evidence, as stated, shows, however, that Watts was occupying the

land even before the amended township plat was filed in March, 1884, and that he did not make his entry until the December following. So that he was clearly outside of the protection accorded by said act.

It is apparent therefore on the case as now presented, that it was error of law to decide that Watts was entitled to the land; and that under the second clause of rule 48, although Watts did not appeal, such decision should have been reversed as "contrary to existing laws and regulations." *Bushnell v. Burt* (5 L. D., 212).

The Department prior to December 8, 1885, having construed rule 48 as allowing appeals from the Commissioner's decision, where the decision of the local officers upon the facts found was evidently contrary to law, although no appeal was taken from the decision of the local officers, it would operate as a great hardship to apply a different construction to said rule, where it is presumable that the appellant relied upon the construction that then prevailed. (*Brown v. Jefferson et al.*, 1 L. D., 474.) But this ruling will not be held to apply to any case in which the decision of the local office was rendered subsequent to December 8, 1885, when rule 81 was so amended as to provide that "no appeal shall be had from the action of the Commissioner of the General Land Office, affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed after due notice to appeal from such decision of said local officers."

The application is therefore granted, and you will please certify up for my examination the proceedings in the case.

NOTARY PUBLIC—CERTIFICATE OF OFFICIAL CHARACTER.

The attestation of a notary public to the execution of a bond, where authorized, imports the same verity as the attestation of a clerk of a court of record.

The certificate showing the official character of a notary public should be made by the clerk of the court in which the appointment appears of record, or the officer in charge of the records containing such appointment.

Acting Secretary Muldrow to Commissioner Sparks, April 5, 1887.

I am in receipt of your letter of the 12th ultimo, transmitting copy of circular of instructions for the execution of bonds.

In your letter you state that it has been the practice of your office to accept the certificate of the clerk of a probate court, when under the seal of his office, as being a sufficient certificate of the official character of a notary public, and submit the question as to the authority of clerks of probate courts to give such certificates or their sufficiency for the purpose. The supposed authority for the existing practice of your office is found in the eleventh paragraph of the circular of instructions, as follows:

"Whenever any acknowledgment is made or oath taken before any officer not a clerk of a court of record, the official character and standing of such officer, whether notary public, justice of the peace, U. S. commissioner, or other officer qualified to administer oaths, should be

evidenced by the formal certificate of the clerk of the proper court of record or other competent authority."

The attestation of a notary public to the execution of a bond (where such attestation is authorized) imports the same verity as the attestation of a clerk of a court of record. For this reason, if certification of the authenticity of their acts is required, it should be from the particular official who alone can certify to such character, and such is the rule of the Department prescribed by paragraph 11 of circular of instructions.

The certification referred to can not be made by the clerk of *any* court of record, but must be made by the clerk of the *proper court* of record, or other competent authority: that is, by the clerk of the court in which such appointment appears of record, and where such appointment does not appear of record in any court, then by other competent authority, such as the Secretary of State, or other officer having charge of the records containing such appointment. Under this rule the clerk of a probate court is not competent to certify to the authenticity of the acts of notaries public and other officials, unless the appointment of such officials appear of record in the court of which he is clerk. The papers are herewith returned.

SETTLERS AND PURCHASERS WITHIN THE LIMITS OF THE NORTHERN
KANSAS RAILROAD.

CIRCULAR.

Commissioner Sparks to registers and receivers, April 30, 1887.

Your attention is called to the following provision of the act of Congress approved March 3, 1887, entitled "An act for the relief of settlers and purchasers of lands on the public domain in the States of Nebraska and Kansas:"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That for the purpose of reimbursing persons and the grantees, heirs, and devisees of persons, who, under the homestead, pre-emption, or other laws, settled upon or purchased lands within the grant made by an act entitled "An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," approved July 23, 1866, and to whom patents have been issued therefor, but against which persons or their grantees, heirs, or devisees, decrees have been or may have hereafter be rendered by the United States circuit court on account of the priority of said grant made in the act above entitled, the sum of \$250,000, or so much thereof as shall be required for said purpose, is hereby appropriated: *Provided, however,* That no part of said sum shall be paid to any one of said parties until he shall have filed with the Secretary of the Interior a copy of the said decree, duly certified, and also a certificate of the judge of said court rendering the same to the effect that such a decree was rendered in *bona fide* controversy between a plaintiff showing title under the grant made in said act and defendant holding the patent or holding by deed under the patentee, and that the decision was in favor of the plaintiff on the ground of the priority of the grant made by said act to the filing, settlement, or purchase by the defendant or his grantor; and said claimant shall also file with the said decree and certificate a bill of the costs in such case, duly certified

by the judge and clerk of said court. Thereupon it shall be the duty of the Secretary of the Interior to adjust the amount due to each defendant on the basis of what he shall have paid, not exceeding three dollars and fifty cents per acre for the tract, his title to which shall have failed as aforesaid, and the costs appearing by the bill thereof so certified as hereinbefore provided. He shall then make a requisition upon the Treasury for the sum found to be due to such claimant, or his heirs and devisees or assigns, and shall pay the same to him, taking such release, acquittance, or discharge as shall forever bar any further claim against the United States on account of the failure of the title as aforesaid: *Provided further*, That when any person, his grantees, heirs, assigns, or devisees, shall prove to the satisfaction of the Secretary of the Interior that his case is like the case of those described in the preceding portions of this act, except that he has not been sued and subjected to judgment as hereinbefore provided, and that he has in good faith paid to the person holding the prior title by the grant herein referred to the sum demanded of him, without litigation, such Secretary shall pay to such person such sum as he has so paid, not exceeding three dollars and fifty cents per acre, taking his release therefor as hereinbefore provided.

SEC. 2. That the provisions of this act shall only apply to the actual *bona fide* settlers on the lands herein referred to, his or their heirs, assigns, or legal representatives, and no one person shall be entitled to the benefits of this act for compensation for more than one hundred and sixty acres of land: *Provided*, That all other persons who purchased any part of said land at one dollar and twenty-five cents per acre, and the money was actually paid into the Treasury, such person, his heirs, assigns, or legal representatives shall be entitled to repayment of the money so actually paid by them.

Approved March 3, 1887.

Under the provisions of this act three classes of persons are entitled to reimbursement, viz:

1. All persons, their grantees, heirs, and devisees, who settled upon or purchased lands within the limits of the grant in question, and to whom patents have been issued, but against whom decrees have been or may hereafter be rendered by the United States circuit court on account of the priority of the railroad grant.

2. Any person, his grantees, heirs, assigns, or devisees, who shall prove to the satisfaction of the Secretary of the Interior, that his case is like those of the class above described, except that he has not been sued and subjected to judgment, and that he has, in good faith, without litigation, paid to the person holding the prior title by the railroad grant the sum demanded of him.

3. Only actual and *bona fide* settlers on the land referred to in the preceding sections, their grantees, heirs, representatives, or devisees, are entitled to reimbursement under the decree, not to exceed \$3.50 per acre; but no one person shall be entitled to compensation at such rate for more than one hundred and sixty acres.

4. All other persons who purchased any part of said lands at \$1.25 per acre, their heirs, assigns, or legal representatives, are entitled to repayment at \$1.25 per acre, provided said money was actually paid into the Treasury.

In the execution of this act the following regulations are prescribed:

1. All applications under this act must be made in writing, and be signed by the party applying, and must describe the tract and designate the entry with certainty.

2. Claimants of the class first described must file copy of the decree, duly certified by the clerk and under the seal of the court rendering the same, to the effect that such a decree was rendered in a *bona fide* controversy between a plaintiff showing title under the grant, and a defendant holding the patent or holding by deed under the patentee, and that the decision was in favor of the plaintiff on the ground of the priority of the grant made by said act to the filing, settlement, or purchase by the defendant or his grantor.

3. Claimant must also file with said decree and certificate, a bill of costs in such case, duly certified by the clerk and under the seal of the court in which the decree was rendered.

4. Claimants of the second class will be required to furnish a certified copy of the record of the transfer from said company, or from the company's grantee, with evidence that he has in good faith paid to the person holding the prior title, the sum demanded of him without litigation.

5. Claimants of the third class should apply for a refundment of purchase-money in accordance with regulations governing the repayment of purchase-money for lands erroneously sold.

6. When the grantee, assignee, or devisee of the original purchaser makes application under this act, he must in addition to the foregoing, show his right to receive the money by furnishing proper authenticated abstracts of title or the original deed or instrument of assignment, or of the will, or certified copies thereof.

7. When application is made by heirs, satisfactory proof of heirship is required.

8. When application is made by executors, the original or a certified copy of letters testamentary must accompany the application.

9. When application is made by administrators, the original or a certified copy of letters of administration must be furnished.

10. All parties who are entitled to repayment under the aforesaid act, will be required to execute a relinquishment, which must accompany the application, in the following or equivalent form:

Know all men by these presents, that I, —, of —, for and in consideration of he sum of —, to me paid by the United States, have released and forever discharged the United States from all claim of any kind, nature, and character whatsoever, by virtue of the act of Congress approved March 3, 1887; and that I am the identical party named in the decree, in the case of — vs. —, or who made said entry No. —, at — Land Office, State of —.

Two witnesses:

STATE OF _____ }
County of _____ } ss.

On this — day of —, 188—, before the subscriber, a — in and for said county, personally came —, to me well known to be the person who subscribed the foregoing release, and who upon being duly sworn by me according to law on — oath declared and acknowledged that — had freely and voluntarily executed the foregoing release

and for the reasons stated; and at the same time came — residing at — and also — residing at —, each of whom being by me duly sworn according to law deposed and said, each for himself and not one for the other, that they well knew the person making the said release to be the individual described in the decree, or who made said entry and who executed the said release.

Subscribed, sworn to, and acknowledged before me this —, 183—. _____

NOTE.—This must be acknowledged before a clerk of a court or other officer authorized to take acknowledgements of deeds in the county where the lands are situated, whose official character and signature must be certified to by the clerk of a court of record.

Approved May 31, 1887:

H. L. MULDROW,
Acting Secretary.

HOMESTEAD—RESIDENCE—MILITARY SERVICE.

ELDOLPH LABARDIE.

In computing the term of military service to be deducted from the required period of residence the actual length of the service should be allowed as shown by the records of the War Department.

Acting Secretary Muldrow to Commissioner Sparks, May 4, 1887.

October 10, 1883, Eldolph Labardie made homestead entry No. 13,577 of the S. W. $\frac{1}{4}$ sec. 24, T. 134 R. 64, Fargo, Dakota. This entry was a transmutation from preëemption declaratory statement No. 13243 filed April 19, 1883, settlement alleged March 2, and residence alleged to have been established June 19, same year. December 13, 1884, he made final homestead proof under section 2305, U. S. Revised Statutes, claiming 3 years, 2 months and 29 days military service in the late war.

* * * * *

When the proof came up to your office it was, by decision dated August 20, 1885, held insufficient only as to the length of time claimant had resided upon his land. Your office allowed him residence from March 2, 1883, till December 13, 1884, a period of 1 year 9, months, and 11 days; and service in the army from February 12, 1862, till date of discharge, August 30, 1864, a period of 2 years 6 months and 25 days, aggregating 4 years, 4 months 6 days.

* * * * *

The main point upon which the appeal herein is based is that your office erred in not allowing claimant credit for his full military service. With the papers here, is filed claimant's original discharge dated August 31, 1864, showing that he enlisted in Co. "A" 7th Reg't Vt. Vols. February 5, 1862, to serve 3 years or during the war, and was discharged from the service of the United States August 30, 1864, by reason of expira-

tion of service. On the back of said discharge I find the following indorsement:

“WAR DEPARTMENT, ADJ. GENL'S OFFICE,
July 25, 1878.

The within named man was enrolled February 12, 1862, and mustered into service to date from June 1, 1861, for 3 years under the name of Eldolph Labardie.

S. N. BENJAMIN,
Asst. Adj Gen'l.”

This paper was also before your office when the decision appealed from was rendered.

I think that claimant is entitled to credit for military service from June 1, 1861, till August 30, 1864, a period of 3 years 2 months and 29 days; and as your office gave him credit for 1 year, 9 months and 11 days *actual* residence upon his claim—thus making an aggregate period of 5 years and 10 days—I can see no objection to allowing his final proof.

Upon the only question raised by the appeal I reverse your decision in the case.

APPROXIMATION—SETTLEMENT BEFORE SURVEY.

LAFAYETTE COUNCIL.

Initiation of claim prior to government survey, extent of cultivable land falling within the lines of the claim as finally surveyed, and valuable improvements on each sub-division considered sufficient reasons for waiving the requirement of approximation.

Acting Secretary Muldrow to Commissioner Sparks, May 10, 1887.

By letter of November 13, 1885, your office suspended the pre-emption cash entry of Lafayette Council for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and lots 2 and 3, Sec. 9, T. 153 N., R. 64 W., Devil's Lake, Dakota, containing 185.90 acres, for excess in area, and required the entryman to relinquish such legal sub-division not covered by his principal improvements, as would reduce the area to the legal maximum, or an approximation thereto.

It appears that claimant settled on January 4, 1883, and on January 7, 1884, made proof before the local officers and received cash certificate; that his improvements consist of a house, barn, well, and about thirty acres of breaking; that he made his filing before government survey, and in accordance with the lines of a private survey, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section; that after said settlement the government survey was extended over said land, leaving said N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ unchanged, but making two lots of said S. $\frac{1}{2}$ of the

NE. $\frac{1}{4}$, viz., said lots 2 and 3, containing 54.60 and 51.30 acres respectively, and that the filing was changed in accordance therewith.

Claimant further alleges that the government survey threw about thirty-five acres of worthless alkali land into the boundaries of his claim along the northern line of said lots; that this land was not within the original claim, and that he believed it would be excluded by the government survey; and that by reason thereof he has only about 150 acres that can be cultivated. His improvements are substantial, and lie partly within each subdivision.

In view of all the circumstances of this case, I am of opinion an exception should be made to the rule of approximation.

Said decision is therefore reversed.

FORT BROOKE MILITARY RESERVATION—ACT OF JULY 5, 1884.

DANIEL MATHER.

In the absence of an adverse claim, failure to file declaratory statement will not prejudice the right of the settler to make final proof and payment.

The act of July 5, 1884, governs the disposal of all lands in abandoned military reservations not theretofore disposed of, protecting the rights of settlers prior to January 1, 1884, who were qualified to make homestead entry.

Acting Secretary Muldrow to Commissioner Sparks, May 10, 1887.

On October 30, 1885, Daniel Mather offered an application in writing at the local office of Gainesville, Florida, to be allowed to make pre-emption entry under the provisions of the act of July 5, 1884, of lots 8, 9 and 10, Sec. 24, T. 29 S., R. 18 E., lot 16, Sec. 18, and lots 12, 13 and 14, Sec. 19, T. 29 S., T. 19 E., and also offered a formal notice of intention to make final proof for said tracts. In an affidavit filed therewith applicant alleged that he settled on said land prior to January 1, 1884, for the purpose of securing a home and entering the land under the pre-emption law; that he established residence thereon in the year 1878, and has remained in continual occupation and possession of the tract ever since; that he has a good dwelling house there, and has improved the tract and made it his home, and that he has never made a homestead entry, and is qualified to make such entry.

The local officers rejected the application, "for the reason that applicant has no claim of record upon which proof can be made covering the lands in question."

Your office, as stated in letter of December 14, 1885, found that the land in question was within the abandoned portion of the Fort Brooke Military reservation, and held that "without passing upon the question as to the right of Mather under the act of July 5, 1884, I would state that having no filing of record for the land in question, he can not be permitted to make a pre-emption entry for the same."

The allegations of claimant indicate a full compliance with the pre-emption law as to residence, cultivation and improvement. (Sec. 2259, R. S.) Section 2265 of the Revised Statutes provides that:

Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler in the order of time on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

It is well established that a failure to so file his declaratory statement will not work a forfeiture of the pre-emptor's right, but will give the better right to the next settler in the order of time, who has filed his declaratory notice and otherwise complied with the law. *Johnson v. Towsley* (13 Wall., 72). In the absence of an adverse claim the failure to file the declaratory statement will not prejudice the right of the settler. The declaratory statement is a notice given by the settler of his intention to purchase the land, and such notice protects his claim against subsequent settlers, for a specified time. The notice is for the protection of the settler, not of the government. In this view I am of opinion that claimant should be allowed to submit proof, if no valid adverse claim attached prior to his said application.

It appears from the record that Mather applied to file declaratory statement for the land in question in May, 1883, and that the application was rejected by the local officers, by your office, and, on May 16, 1884, by this Department, on the ground that the lands included in said reservation should be appraised and sold at public sale. (2 L. D., 606.)

This leads to a consideration of the proper method of disposing of the lands in said reservation, not yet disposed of.

The reservation for Fort Brooke was established by Executive order of December 10, 1830, and embraced an area sixteen miles square. After various modifications and reductions, the remainder, containing 148.11 acres, was duly relinquished by the Secretary of War to the Secretary of the Interior, January 4, 1883, under the act of August 18, 1856. The present inquiry relates to lands within the area thus relinquished.

Said act of 1856 provided:

That all public lands heretofore reserved for military purposes in the State of Florida, which said lands in the opinion of the Secretary of War are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be and are hereby placed under the control of the General Land Office to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States. (11 Stat., 87.)

Section six of the act of June 12, 1858 (*Ibid.*, 336) provided:

That all the existing laws or parts of laws which authorize the sale of military sites, which are or may become useless for military purposes, be and the same are hereby repealed and said lands shall not be subject

to sale or pre-emption under any of the laws of the United States: *Provided further*, That the provisions of the act of August 18, 1856, relative to certain reservations in the State of Florida, shall continue in force.

In view of these statutes and of section 2364 of the Revised Statutes, providing that "whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of," this Department by said decision of May 16, 1884, held that the lands in the Fort Brooke reservation were not open to entry; but should be ordered into market by the Commissioner to be appraised and sold. It was further said that the disposition of the lands might be rightly made under section 2455 of the Revised Statutes, which provides that—

"It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, *and such other isolated or disconnected tracts* or parcels of unoffered lands, which in his judgment it would be proper to expose to sale in like manner."

After the rendition of said opinion the act of July 5, 1884 (23 Stat., 103), was passed. That act prescribes the method for disposing of all abandoned military reservations. Prior thereto special acts had been passed from time to time for the disposal of such lands, as the occasion arose. The act of 1884 makes general provision for the disposition of such lands, and in my opinion governs the disposal of all lands in abandoned military reservations, not theretofore disposed of. This view is emphasized in the present case by the fact that section four of said act repealed the only existing laws under which such reservations in Florida could be disposed of. It provides: "That the provisions of the act of August 18, 1856, relative to military reservations in the State of Florida, and the sixth section of the act of June 12, 1858, relative to the sale of military sites, be, and the same are hereby, repealed."

The first section of said act provides:

That whenever in the opinion of the President of the United States the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same, or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice hereof.

The act then provides for the survey, appraisal and public sale of the lands, provided that any settler who was in occupation of any portion thereof prior to January 1, 1884, who was qualified to make a homestead entry, and who has continued in such occupation, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres.

From the foregoing recital, it seems certain that the land must be disposed of under the act of 1884. The allegations of claimant, if true,

place him within the provisions of said law. He is therefore entitled to offer proof, and if in all respects qualified, may make entry, provided there is no objection other than those discussed herein.

The decision, rejecting the application, is accordingly reversed.

PRACTICE—SERVICE OF NOTICE BY PUBLICATION.

ROLLINS *v.* ROBBINS.

When service of notice by publication is properly made the defendant is as much bound thereby as though the service had been personal, and cannot be heard to allege want of actual notice.

It is not essential to allege as basis for publication of notice that personal service cannot be had "within the State."

Acting Secretary Muldrow to Commissioner Sparks, May 10, 1887.

On January 20, 1880, Hiram Robbins made homestead entry for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 32, T. 4 N., R. 30 W., McCook, Nebraska. On March 20, 1884, William M. Rollins brought contest for abandonment. Notice was given by publication, the testimony of plaintiff and one witness was taken to the effect that the claim had been abandoned for over two years, that no house or other habitation had ever been built on the tract, that about four acres had been broken in 1882, and that the land at date of hearing, May 9, 1884, was uncultivated prairie land. Claimant did not appear. The local officers thereupon rendered judgment for contestant. On November 21, 1884, your office affirmed that judgment.

It appears that on June 21, 1884, the claimant filed a motion in the local office asking that the Commissioner set aside the decision of the local office. The motion was based on the allegation that claimant never had notice of the contest proceedings. In an affidavit filed therewith claimant alleges that "no notice of said contest was ever served upon him," that "he has been continuously a resident of the State of Nebraska during the last five years," that during the spring of 1880 he built on said tract a sod house sixteen by eighteen feet, "commenced residence therein," and broke about fifteen acres; "that during his temporary absence some party unknown to affiant tore off the roof of his house and carried the materials away; that the walls are yet standing and that claimant is compelled to rebuild said roof"; that he made said entry for his home and has in good faith made the tract his residence, and that when he left said house it was for temporary purposes and not with the intention to abandon said entry.

Claimant does not deny that he was *actually* absent from the land, nor does he attack the validity of the affidavit for publication. He does not pretend that any amount of diligence on the part of contestant

at the initiation of the contest would have enabled him to make personal service.

Contestant in his affidavit for publication alleged that claimant's residence was unknown to him, that personal service could not be had in the State, and that he had made diligent inquiry to ascertain claimant's address, but had been unable to do so. Notice was posted on the land, and a copy sent by registered letter to Minden, Nebraska, the last known address of claimant.

For some reason not stated no action was taken by your office on the application of claimant until February 26, 1885, when you denied it. Claimant appealed.

The rules of practice prescribe that when it appears by the affidavit of contestant, and such other evidence as the local officers may require, that due diligence has been used and personal service can not be made, that service by publication may be made. When such service is properly made, the defendant is as much bound by the notice as though the service had been personal. He can not be heard to say that he did not get actual notice. It does not appear from this record that there was any defect in the service by publication, nor is it shown that the foundation for such service was not sufficient. I must hold therefore that the defendant was bound by the proceedings subsequent thereto. The statement of claimant that he has continuously resided in the State of Nebraska can not affect this conclusion, for the allegation in the affidavit of contest that "personal service can not be had *within this State*," was not essential thereto. Said decision is accordingly affirmed.

SWAMP LAND—ADJUSTMENT OF GRANT.

STATE OF ARKANSAS.

Until such time as the Governor of the State shall have been duly authorized to consent to the adjustment of the grant, in accordance with the principles heretofore adopted and followed by the Department, no farther action will be taken on the claim of the State.

Secretary Lamar to Commissioner Sparks, May 16, 1887.

On April 15, 1887, the communication of Hon. Simon P. Hughes, Governor of the State of Arkansas, dated April 8, same year, inclosing a copy of the act of the Legislature of said State, approved March 19, 1887, relative to the claim of said State to swamp lands, and also for indemnity for swamp lands disposed of by the United States, was referred to you for report. On April 23d last said communication and inclosure were returned, with your report, and the same have been carefully considered.

It appears that the Legislature of said State passed an act, approved March 17, 1885, relative to its claim under the swamp land act of Congress, approved September 28, 1850 (9 Stat., 519), agreeing to "accept as final and conclusive in determining the character of such lands the original field notes of the official survey or re-survey of such lands by the United States in all cases mentioned in this act where such field notes show conclusively the naturally wet, swampy, or overflowed, or the naturally non-wet, non-swampy, non-overflowed, character of such lands: *Provided*, That in no case shall such field notes be considered as final in determining the character of such lands where such field notes fail to indicate the natural character of such land; and *Provided* further, That in no case shall such field notes be considered in such adjustment or selection in cases where the official survey was made subsequent to the year eighteen hundred and fifty-six (1856)."

This act was submitted to your office for report, and on May 21, 1885, said act was returned with the recommendation that the change proposed therein be not adopted, because of its impracticability. Your report called special attention to the last lines of the first section of said act, and also to said provisos (*supra*), and noted the fact that the States of Michigan, Minnesota, Wisconsin, Ohio, Alabama, and Mississippi, have agreed to make the field notes the basis of adjustment without any reservations. On August 15, 1885, this Department transmitted a copy of said report to the Governor of said State, and declined to accept the mode of adjustment provided for in said act.

Attention was called to the mode of adjustment of said States, and the inquiry was suggested "whether that basis would be acceptable to the State of Arkansas" (4 L. D., 295).

On August 28, 1885, this Department informed the agent of said State, in reply to his communication of the 21st of same month, that, "believing that the field notes of survey as found in the General Land Office constitute the *just basis* for determining the character of the land claimed by the State," the plan of adjustment as indicated in said communication to the Governor of said State would be adhered to.

Said act of March 19, 1887 (*supra*), amends the first section of the act of March 17, 1885, by striking out the two provisos above quoted. You regard the amended act as equally objectionable as the original act, for the reason that it introduces a different class of lands from those granted by Congress, to wit, "wet land"; that the field notes should be conclusive in all cases, or the existing method of adjustment should not be changed; that there should not be two methods of adjustment in the same State; and that when a claim for indemnity for land in any township is once made, such claim should be regarded as a finality so far as that township is concerned.

By the act of Congress approved September 28, 1850 (9 Stat., 519), there was granted to the State of Arkansas and each of the other States

of the Union all of the "swamp and overflowed lands made unfit thereby for cultivation," which remained therein unsold at the date of the passage of the act. This act has been frequently construed by the courts and this Department. In the case of the State of Louisiana (5 L. D., 514), it was held that, if the State elects to accept the field notes of survey as the basis of adjustment of its claim under the swamp land grant, lands will be listed to the State that appear by the field notes to be clearly of the character granted, unless there is reason to believe that the field notes and surveys are false and fraudulent; that where the field notes of survey have been made since the passage of the swamp land grant and with reference thereto, they will be held to entitle the State prima-facie to the lands returned as "swamp and overflowed," without the additional words "made unfit thereby for cultivation"; that where the surveys are made prior to the act, all the descriptive words in the grant, or words of like import, must appear; that where they do not so appear, the State must show by other satisfactory evidence that the lands claimed are of the class contemplated by the grant; that, if the State does not elect to make the field notes of survey the basis of adjustment, then she should be allowed to furnish satisfactory proof that the lands claimed were swamp and overflowed and rendered "unfit thereby for cultivation" at the date of the grant.

Under the acts of Congress, approved March 2, 1855 (10 Stat., 634), and March 3, 1857 (11 Stat., 251), incorporated into the Revised Statutes, Section 2482, it was provided that when the authorized agent of the State shall make proof before your office that any of the lands purchased by any person from the United States, prior to March 3, 1857, and after the date of the grant to the State, were swamp lands within the true intent and meaning of the swamp land grant, the purchase money shall be paid over to the State wherein said land is situate.

Indemnity was also allowed where swamp lands have been located by warrant or scrip, and it was further provided that the decision of your office upon the question of indemnity shall be first approved by the Secretary of the Interior. In determining the character of the lands for which indemnity is claimed, I see no good reason why the same kind of proof should not be satisfactory to your office that is required to show that lands are clearly of the character granted and which passed to the State under its grant.

The original and the amendatory act of the Legislature of said State limit the power of the Governor to make an agreement with the Secretary of the Interior "to accept as final and conclusive in determining the character of such lands, the original field notes of the official survey, or resurvey, of such lands by the United States in all cases mentioned in this act where such field notes show conclusively the naturally wet, swampy, or overflowed, or the naturally non-wet, non-swampy, or non-overflowed character of such lands."

The objection relative to the descriptive words used to designate the character of the land, as suggested in your report of May 21, 1885, has not been obviated, nor does said act, as amended, authorize the Governor to bind the State to an agreement to accept the field notes as a basis of adjustment where they do not show "conclusively" the character of the land.

In said communication of this Department to the State's agent (*supra*), it was stated that this condition, among others, was a qualification of the Governor's power to act in the case, and it could not be waived.

Since the State, by said legislation has undertaken to define the power and limit the authority of the Governor to make an agreement under said acts, I am of the opinion that no further action should be taken by this Department relative to the claim of the State under the swamp land acts, until the Governor has been given full power by appropriate legislation to consent to the adjustment of said grant and the claim of the State for indemnity in accordance with the principles enunciated in the Louisiana case (*supra*). When such legislation has been enacted, the claim of the State should be adjusted as soon as practicable.

Herewith are returned said communication of the Governor and said act of the Legislature of the State of Arkansas, and you will please advise him of this communication to you.

PRACTICE—AFFIDAVIT OF CONTEST—EVIDENCE.

DOLMAN v. LATSHAW.

Objections to the sufficiency of the matters charged in the affidavit of contest, or to the relevancy of the evidence under the charge as laid, can be raised by the defendant only.

Acting Secretary Muldrow to Commissioner Sparks, May 19, 1887.

I have considered the appeal of George W. Dolman from your decision of May 4, 1885, sustaining the local land officers in refusing to allow him to contest the timber culture entry No. 7002 of William Stonehacker on the NE. $\frac{1}{4}$ of Sec. 2, T. 6 S., R. 23 W., in Graham county, Kansas.

On June 5, 1880, Stonehacker made timber culture entry of said quarter section. On September 6, 1884, J. J. Latshaw instituted a contest against said entry and made application to enter same under the timber culture act of June 14, 1878. In his affidavit of contest he says that Stonehacker "has failed to cultivate and keep in a good healthy growing condition ten acres of the above described tract of land between the 5th June, 1883, and the 5th June, 1884."

On September 10, 1884—four days after Latshaw instituted his contest—the appellant Dolman made affidavit of contest, and made application to enter said tract of land, accompanied with a tender of all fees and commissions and the usual entry affidavit.

Hearing in the Latshaw case was set for December 5, 1884, Stonehacker, who had acknowledged service of notice, made default. On the day of hearing Dolman came in by way of interpleader and moved the local officers to dismiss said contest because of defects in the contest affidavit. Though no steps were taken to amend said affidavit, this motion of the appellant was overruled, and testimony taken in the case. Thereupon appellant again moved to have the contest dismissed, because of said defective affidavit, and because the testimony was not confined to the allegations contained in the contest affidavit; and for the further reason that the facts shown were insufficient to warrant the local officers in recommending said entry for cancellation. This motion was also overruled and the register and receiver found, from the testimony produced, that the land embraced in said entry had been forfeited for failure to comply with the law, and recommended that the entry be canceled. On appeal from your decision sustaining the local officers, Dolman urges substantially the same objections urged by him below, and insists that at the time he made application to contest said entry there was no contest, sufficient in law, pending against the same, and that not to dismiss the Latshaw contest and permit him to contest, under his application and his legally sufficient affidavit of contest, was error.

In my opinion the defect found in Latshaw's contest affidavit did not render his contest illegal. When the defect was discovered, it would have been safer for the contestant, and the better practice, to have asked for leave to amend before producing his testimony, but it was a defect which could be taken advantage of by the entryman only. The refusal to dismiss the contest on appellant's first motion was, therefore, not error. A variance between the allegation and the proof is also a matter which can only be excepted to by the defendant; and where the local land officers find, on the hearing of a contest which is not attacked as being collusive, that the land embraced in an entry has been forfeited for a failure on the part of the entryman to comply with the law, the Department will not look into the evidence to determine the question of its sufficiency to warrant the cancellation of such entry merely on the suggestion of a party who has, subsequent to the institution of such contest, applied to contest the entry, and who has himself sworn to facts sufficient to show the correctness of such finding and to warrant the cancellation of the entry.

Your action in the premises is therefore concurred in, and the appeal dismissed.

ENTRY OF MEANDERED STREAM.

JAMES SHANLEY.

An entry including tracts lying upon the opposite sides of a meandered stream, made under existing rulings and practice, will not be disturbed.

Acting Secretary Muldrow to Commissioner Sparks, May 19, 1887.

On February 24, 1880, James Shanley made homestead entry for lots 1, 2, 8 and 9, Sec. 4, T. 3 N., R. 26 W., McCook, Nebraska. On June 19, 1885, he submitted final proof. The proof showed that he settled in the fall of 1879, and has since maintained a continuous residence and in other respects complied with the law.

Said lots 1 and 2 lie north of the Republican River, lots 8 and 9 south of it. Your office by letter of November 14, 1885, rejected said proof for the reason that the portion of the land north of the river was not contiguous to that on the south, and required claimant to "elect which tracts to retain in satisfaction of his homestead right." He appealed.

This case seems to be ruled by that of Olof Landgren (11 C. L. O., 255.) Landgren filed declaratory statement on July 19, alleging settlement July 18, 1883, for certain lands in the McCook land district. On February 11, 1884, he offered proof, which was rejected by the local office and by your office, "for the reason that the tracts lie on opposite sides of a meandered stream (the Republican River) and hence that his declaratory statement was improperly allowed."

On appeal this Department said:

You affirmed this ruling because, although his proofs are satisfactory, his entry is in violation of your instructions of September 22, 1883, in the case of Benjamin Bird, which held that as the Republican River had been meandered, no entries of lands separated thereby could be approved, but that parties having made such filings might relinquish a portion of their tracts, and their filings stand as to the remainder, and also include other contiguous tracts in lieu of the relinquished ones.

The local officers in transmitting this case to you say "it has been the practice until about September 1883 to allow entries on both sides of the Republican River, and that proofs have been admitted and patents issued thereon without objection until about September 1883, and that there are many (such) entries on the river within this land district in that way.".... Landgren made his settlement and improvements and filed his declaratory statement prior to your instructions of September 22, 1883, when under the practice and rulings of your office, filings and entries like that in question on this river were permitted. These rulings and practice had the force of law, and Landgren, who had acted thereunder in good faith, should be protected in his settlement without loss of any portion of his labor or money by reason of a subsequent change in such rulings and practice.

Without therefore here questioning the general correctness of the instructions of September 22d, I think they should not have a retroactive effect, but operate only in subsequent cases. To hold otherwise would

work extreme hardship in many cases. . . . and throw a cloud upon titles and rights already acquired under the sanction of your office.

The entry of Landgren was allowed to stand.

On the authority of that case, said decision is reversed.

DESERT LAND ENTRY—COMPACTNESS.

JAMES S. LOVE.

In determining the compactness of an entry the situation of the land and its relation to adjacent lands should be duly considered.

Acting Secretary Muldrow to Commissioner Sparks, May 20, 1887.

April 4, 1885, James S. Love made desert land entry No. 2443 of Lots 1, 2, 3 and 4, Sec. 4, T. 18 N., R. 62 W., Cheyenne, Wyoming. September 26, 1885, you held this entry for cancellation because it was not compact. The entryman has appealed and the case has been given consideration.

This entry embraces 173.44 acres, and is one mile in length. It appears of record, however, that the lands lying immediately adjoining these have all been entered under the desert land law by other parties, so that there is no way of rendering said entry more compact than it is and still retaining an equal amount of land.

This case is precisely like that of Ann E. Miller, decided by this Department May 22, 1886.* In that case the entry was a mile long and a quarter of a mile wide, and the adjoining lands were all appropriated by other persons. It was there held that the entry was compact and

*ANN E. MILLER.

Acting Secretary Muldrow to Commissioner Sparks, May 22, 1886.

* * * * *

The Department ruling defining compactness is to be found on page 35 of the general circular of March 1, 1884, which is copied verbatim from your office circular of September 3, 1880, and is in the following words:

"The requirement of compactness will be held to be complied with in surveyed lands when a section, or part thereof, is described by legal subdivisions, as nearly in the form of a technical section as the situation of the land *and its relation to other lands will admit.*"

In the case at bar, the appellant has entered a strip a mile in length from north to south, and a quarter of a mile in width from east to west. But there is no way of making it more compact. The land on the east side is included in the desert-land entry of Samuel Richey; that on the west side is included in section 16, which is reserved for school purposes, and not subject to entry under the desert land act. The tract is, therefore, as compact "as the situation of the land and its relation to other lands will admit."

I therefore reverse your decision directing a re-adjustment of the entry.

should stand, citing a part of the General Circular of March 1, 1884, to wit:

"The requirements of compactness will be held to be complied with on surveyed lands when a section or part thereof is described by legal subdivisions as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit."

Upon authority of said case your decision is reversed,

PRE-EMPTION—AMENDMENT—SECOND FILING.

GOIST v. BOTTUM.

An application for land not intended to have been embraced within the original application cannot be properly allowed as an amendment.

If the pre-emptive right has once been exercised there is no power, save in Congress, to authorize the exercise of the privilege again by the same person.

A second filing is permissible under the law where the first was ineffectual on account of a prior adverse claim.

Where rights and equities are equally divided, the rule that "he has the better title who was first in point of time" should be followed.

Acting Secretary Muldrow to Commissioner Sparks, May 20, 1887.

I have considered the case of Frank Goist *v.* Daniel Bottum, on appeal from your decision of July 7, 1885, holding for cancellation the pre-emption filing of Goist for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 114 N., R. 62 W., Huron, Dakota Territory.

There is no dispute as to the facts of the case, which are substantially as follows:

On January 25, 1883, Goist presented at the local office pre-emption declaratory statement claiming settlement the day before, on the NE. $\frac{1}{4}$ of Sec. 34, T. 114 N., R. 64 W. The register examined the plat book, and the tract appearing to be vacant, the declaratory statement of Goist was made of record. A few days thereafter the latter heard from outside parties that said tract was already covered by a soldier's declaratory statement placed thereon by one Hugheson during the preceding month of October. Another visit was paid to the register, who was induced to make a further search, when he found among some papers a receipt showing that such soldier's declaratory statement had been filed in said office, though the tract books contained no record thereof. The register then advised Goist to select another tract, and make filing therefor. Thereupon selection was made of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 114 N., R. 62 W., in the same land district. An affidavit was then—February 1, 1883,—made by Goist, duly corroborated, stating the facts, and also application to be "allowed to amend his declaratory statement filing," as above. This application and affidavit were handed to the register, who said the same would be for-

warded to the General Land Office; and on inquiry, a few days thereafter, it was stated they had been so forwarded.

On February 16, 1883, Goist having settled on the last tract, built a house on the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ thereof, moved into it, and remained there some six or seven days, when he started to Illinois to bring his family, stock, etc., to the land.

It is shown that the trains were blockaded by snow, and he was delayed both going and coming, and did not get back, upon the tract in controversy, until the 31st day of March, and since then has resided with his family upon said tract, on which he has improvements valued at \$2,000.

On March 7, 1883, Daniel Bottum visited the NE. $\frac{1}{4}$ of said last mentioned section, and on the next day made homestead entry thereof, the tract book of the local office not disclosing any claim thereto, nor the officers giving him any information of the claim of Goist to the W. $\frac{1}{2}$ of said NE. $\frac{1}{4}$.

Though the testimony shows that the application of Goist was presented to the local officers somewhere about February 1st, there is no file date upon it, and it was not forwarded to your office until May 25, 1883; and in the letter of transmittal attention was called to the conflict between the two claims. On August 13, 1883, your office, considering the application of Goist and his allegation of settlement prior to the homestead entry of Bottum, directed that the pre-emption filing "be received for the tract desired and the homestead entry of record may stand subject to Goist's prior right." Accordingly, on August 29, 1883, the pre-emption declaratory statement of Goist, claiming settlement February 16, 1883, was made of record, as to said E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$.

After due notice, on January 28, 1884, Bottum offered to make final proof on and commute to cash his homestead entry on said NE. $\frac{1}{4}$. This was protested against by Goist, and a hearing was had, at request of both parties, on February 5, 1884.

On October 6, 1884, the local officers decided in favor of Goist; on January 7, 1885, your office, on appeal, reversed said decision and awarded the disputed W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ to Bottum: from this decision Goist has in turn appealed to this Department.

The case has been argued with much zeal by counsel in their briefs, and involving questions of importance, has been carefully considered. Both parties throughout seem to have acted in entire good faith and done that which the law required in order to secure title to the desired land. The whole difficulty has arisen from the failure of the local officers to keep their records properly posted. Matters being thus *in equilibrio*, a most careful scrutiny of the whole case is imperatively demanded.

It is contended that the so-called "amendment" of Goist was not a proper one to be allowed as such; inasmuch as it applies to land twelve

miles away, and in another range, and which it is not claimed was intended to have been embraced in his first application. In this view I concur. Though so called, it was not an "amendment" in the proper sense of the word. It was an application to file a pre-emption declaratory statement for a certain tract, and which application the local officers, declining to act upon, was transmitted to your office. The letter of your predecessor, of August 13, 1883, granting the application, seems to adopt this view and does not treat it as an "amendment," about which not one word is said. The application of Goist will not therefore be treated as an application to amend his first filing, but as, in contemplation of law, an application to file declaratory statement on the tract in section 27.

This it is asserted he is prohibited from doing by Section 2261 of the Revised Statutes; and the Commissioner, it is insisted, was without authority to confer such right, or, if possessed of that authority, the right acquired thereunder could only date, at the earliest, from the time it was conferred by the Commissioner, which in this case was August 13, 1883.

If the Commissioner has power to confer a pre-emption right upon any person, I am unaware of the law which bestows that power. The act of Congress alone gives the one pre-emptive right to parties, otherwise qualified for its exercise. When that right has once been exercised, the privilege conferred is exhausted, and as the law now stands, there is no power anywhere, save in Congress, to authorize the exercise of the privilege again by the same person. It is therefore useless to discuss the question as to when the right, supposed to have been conferred by the Commissioner in this case, dated from; whether when he awarded it; when it was exercised, or from the date of the actual settlement, or when the application was presented?

The important question then is, had Goist exercised his one pre-emptive right, or did he come within the inhibition contained in section 2261 of the Revised Statutes?—which is as follows:

No person shall be entitled to more than one pre-emptive right by virtue of the provisions of Section 2259; nor where a party has filed his declaration of intention to claim the benefit of such provisions, shall he file, at any future time, a second declaration for another tract.

On March 3, 1856, Commissioner Hendricks issued a circular (1 Lester, No. 416), construing the fourth section of the act of March 3, 1843 (5 Stat., 619), from which section that of the Revised Statutes was taken. In that circular it was said:

Where a claimant, however; files a declaration, which may prove invalid, in consequence of the land applied for not being open to pre-emption, or by the determination against him as a conflicting claimant, or from any other similar cause, which would have prevented him from consummating a pre-emption under such declaration, such illegal filing will be treated as a nullity, and as no inhibition to his subsequently filing a legal and proper declaration for the same tract or for other land; it being the purpose of the law to allow a claimant

a pre-emption upon one tract, and nothing more, and also to prevent declarations from being presented or filed where the intention of establishing a pre-emption is not bona-fide.

This construction of the law, so far as I can learn, has been uniformly adhered to, in the administration of the Land Department from the time of its promulgation to the present day.

In the case of Hannah M. Brown (4 L. D., 9) the same view was reiterated, and it was said:

When the law restricted persons otherwise properly qualified to "one pre-emptive right," it meant a right to be enjoyed in its full fruition; not that a fruitless effort to obtain it should be equivalent to its entire consummation. So when the law declares that a party having filed a declaration of intention to claim such right as to one tract of land should not file a second declaration as to another, it meant the filing on a tract open to such filing, and whereon the right thereby claimed could ripen into an entry.

The case under consideration comes clearly within the rule thus established.

The record discloses that the soldier's declaratory statement, which was filed on the first tract, was, in due course of time, consummated by Hugheson, and consequently, if Goist had persisted in adhering to his filing as to that tract, which he was not bound to do after he discovered the adverse claim to it, "the right thereby claimed could not ripen into an entry." This being so, Goist cannot be held to have exercised the "one pre-emptive" to which he was entitled; nor was the filing such a one as the prohibition of the Revised Statutes is properly applicable to, and therefore in my opinion your predecessor was right when he treated the first filing of Goist "as a nullity, and as no inhibition to his subsequently filing a legal and proper declaration for . . . other land," in the language of the circular of 1856.

Entertaining this view, it follows that Goist's application to file pre-emption claim upon the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 27, must be treated as though an original offer to file, which he was fully qualified to make. His right thereunder must date from the time he made actual settlement upon said tract, which was February 16, 1883; the action of the land officers can not change said date, for that action conferred no new right, but simply declared that the man was a qualified pre-emption claimant when he presented his filing, and the same ought then to have been received.

It follows naturally from this premise that the failure of the local officers to have noted on the proper records of their office his claim against said tract can not be permitted to work to his prejudice, inasmuch as he had done all the law required of him and the officers alone were derelict in this duty. His pre-emption claim stands therefore in a light not less favorable than it would have stood if he had been permitted by the local officers to do that which was offered to be done. *Lytle v. Arkansas*, 9 How., 314.

It is true that this failure of the officers to make the proper notes upon their records is thus made to work a hardship upon Bottum, another innocent party who visited the land and examined the records before presenting for record his entry papers—thus having likewise done all that the law required of him. But the law must be administered on principle, notwithstanding individual hardship may sometimes be caused thereby, as to deviate from a general rule because of particular hardship, is most mischievous and dangerous. For, as has been repeatedly said, “hard cases make bad law.”

The safe rule which the courts apply to a case of this sort, where equities and rights are so equally divided, is that “he has the better title who was first in point of time.” Goist was a qualified pre-emptor; first in point of time, he made application for the land in controversy; first in point of time he made personal settlement upon the tract embraced within his claim—such settlement as the law required and such settlement as would have reserved it from the claim of any other comer, if the application had been properly put of record—and first in point of time he did all that the law required of him.

Under this rule, I reverse the judgment appealed from, and hold that Goist has the prior right to the land in controversy, and the homestead entry of Bottum is subject to such prior right.

PRACTICE—MOTION FOR CONTINUANCE.

UNITED STATES v. CONNERS ET AL.

Motions for continuance are addressed to the sound discretion of the local officers, but an abuse of such discretion will be corrected by the appellate tribunal. On the defendant's failure to cross-examine witnesses at the proper time, the recall of said witnesses, for such purpose, should be at his expense.

Secretary Lamar to Commissioner Sparks, May 21, 1887.

The following pre-emption entries in the St. Cloud, Minnesota, land district, to wit.

James Conner for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 59 N., R. 24 W.:

* * * * *

Were suspended by your office letter of January 16, 1885, and a hearing ordered upon the report of Special Agent Webster Eaton, who reported said entries as fraudulent, and made in the interest of John Martin & Co.

The hearing in all of said cases was set for February 23, 1885, and notice made by publication as well as by registered letter sent to said entrymen and to John Martin & Co.

By letter of March 24, 1885, the register and receiver transmitted the record in the case of John Conners, saying:

At the time and place set, Webster Eaton, special agent of the General Land Office, appeared with his witnesses, and the testimony on the part of the government was taken. Also appeared Taylor & Taylor, and filed the affidavit of C. E. Brown, asking for a continuance. All the papers in the case are transmitted herewith for your consideration and action.

Letters to the same effect were prepared by the register and receiver, transmitting the record in each of the other cases.

Upon the receipt of the letters transmitting the records aforesaid, you considered all of said cases in your letter of May 27, 1885, and held that—

The evidence for the government sustains the allegations of fraud and speculation involved in the hearings, and the defence being in default the entries are hereby canceled.

From said decision of May 27, 1885, and your office decision of July 17, 1885, refusing to review said decision, the John Martin Lumber Company, transferees under said entrymen, appeal.

It appears that Taylor & Taylor, attorneys for the John Martin Lumber Company, made a motion for a continuance of said case, February 21—two days before the day set for the hearing—and filed in support of said motion the following affidavit of C. E. Brown, the Secretary of the John Martin Lumber Company:

Cyrus E. Brown, appearing personally before me, and being sworn says: that he is the secretary of the John Martin Lumber Company, a corporation, and that said John Martin Lumber Company claims to be the owner by purchase from the entrymen of each of the above-mentioned tracts of land; that it paid a valuable consideration therefor; that notices of hearing in said cases were received by it on the 12th day of February, 1885; that the said James Conners, are each of them unmarried men, and have not since the purchase of said lands so entered by them by the affiant had any permanent place of residence; that in the time since said notices were received by it affiant has not been able to discover the whereabouts of either of said persons; that affiant is informed and verily believes that said Conners, are laboring men by occupation, and are now engaged at some of the lumber camps upon the head waters of the Mississippi river a great distance from communication by mail or telegraph; that they and each of them are material and competent witnesses in said cases; and affiant is informed and believes will, if time is granted so that their whereabouts can be ascertained and their testimony secured before said land office, each testify that he entered upon said land in good faith, and built a good and substantial dwelling house thereon, with floors, windows, doors, roof and cellar; that he cleared off, grubbed, broke, and fitted for cultivation a large tract of said land, and made other valuable improvements thereon; that during the time prescribed by law, and for a long time thereafter he lived and made his home upon said land that he is a poor man and had no means of improving said land except his own unaided manual labor; that said entry of said land was made for the sole purpose of cultivation and to make a home for

himself thereon; that all his acts in and about his said entry were done in good faith, and that he in all things complied with the pre-emption laws; that at the present time of year communication with the upper Mississippi river is very difficult, and can only be had at all by great exertion and unusual expense; that it will take a long time to procure the attendance of said persons to testify in said matters at said land office; that affiant verily believes if time is granted him he will be able to procure the attendance of said persons before said land office to testify in said matters; that affiant knows no other witnesses by whom said facts can be proven. Wherefore affiant prays that the hearings in said actions may be postponed for a reasonable time to enable him to procure the attendance of said persons before said land office to testify in said cases. And further saith not.

At the hearing of said cases, February 23, there was no appearance for either the entrymen or the John Martin Lumber Company; but Special Agent Eaton appeared for the government, objected to a continuance of the case, and offered evidence in behalf of the government—which was received.

In the report of the hearing the register and receiver say that it was their intention "to take the testimony on the part of the government, and then continue the case for sixty days to allow the John Martin Lumber Company to procure the attendance of their witnesses"; that it has been the policy of the office to grant continuances upon good cause shown; but that the special agent insisted that no good cause for a continuance had been shown.

By circular of the Department of August 6, 1884 (11 C. L. O., 161) in view of the exhaustion of the appropriation, registers and receivers were directed to postpone all hearings without date; but the register and receiver were advised in the letter ordering a hearing in these cases, that said hearing would not be subject to the instructions contained in that circular. Referring to this the local officers say:

Being in doubt as to the desire of the Department for an immediate hearing, we have taken the testimony submitted through Special Agent Eaton on the part of the government, and now submit the case to you for consideration as to whether a continuance shall be granted the John Martin Lumber Company or not.

Upon this point, in your decision of May 27, 1885, canceling these entries, you say:

The matter of granting continuances is in your discretion to be exercised in view of the established facts as a foundation for the continuance. That you submitted the evidence offered on behalf of the government on the day fixed for the hearing concludes the presumption that you were not satisfied that the continuance should be granted Your exercise of your discretion was complete and proper, as appears from the record."

It is true that all motions for a continuance are addressed to the sound discretion of the local officers; but an abuse of such discretion should be corrected by the appellate tribunal. The claimants made a proper showing in full compliance with Rule 20 of Rules of Practice, and the continuance asked for should have been granted.

Besides, the record does not show that the local officers were not satisfied that the continuance should be granted, or that they exercised any discretion in refusing it; on the contrary, they submitted that question to your office for decision.

With the motion for review of your decision the John Martin Lumber Company file the affidavit of C. E. Brown, who says that since said hearing they have learned of the whereabouts of said witnesses, and verily believe they will be able to secure their attendance at the local office should a rehearing be granted, and that they expect to be able to show by said witnesses the facts as to settlement and residence of said entrymen and to sustain their title to said lands.

From the foregoing, I am satisfied that the showing of the defendants was sufficient to entitle them to the continuance asked for, and that a rehearing of said case should be had to enable them to introduce testimony in their behalf.

It appears from the record that it was the intention of the register and receiver to take the testimony on behalf of the government, and then to suspend the further hearing of said case for sixty days—if approved by your office—to enable defendants to introduce their proof; and this seems to have been the impression made upon counsel for defendants.

There would seem to be no objection to this proceeding, and as the defendants have shown no reason why they did not attend at the hearing on the 23d of February to cross-examine the government witnesses, I see no reason why the government should be compelled to re-submit its proof, especially as such proof appears of record. I therefore direct that you order the further hearing of this case before the register and receiver, after thirty days notice to all parties, to enable the defendants to submit testimony in their behalf, at which the government may also introduce such other testimony as it may desire; and if practicable a special agent should be present to represent the government. Should the defendants desire to recall the witnesses offered by the government at the hearing of February 23, 1885, for the purpose of cross-examination, they will be required to summon them at their expense.

WAGON ROAD GRANT—SELECTION—WITHDRAWAL.

RINEHART v. WILLAMETTE VALLEY & CASCADE MT. WAGON ROAD Co.

The grant to aid in the construction of this road was not a grant of lands in place, or of specific lands, but a grant of quantity, to be selected from the odd numbered sections within certain boundaries determined by the construction of the road; hence without selection the right of the company does not attach to any specific tract.

The construction of the road and the filing of a map of definite location thereof did not cause the grant to attach to any particular tract of land, or withdraw from entry the lands within the limits fixed thereby.

An executive withdrawal is not effective until notice of the same is received at the local office.

Secretary Lamar to Commissioner Sparks, May 23, 1887.

This case involves the right to the NW. $\frac{1}{4}$ of Sec. 29, T. 13 S., R. 45 E., W. M., La Grande, Oregon.

The company claims the right to select the land in controversy under the act of Congress of July 5, 1866 (14 Stat., 89), granting to Oregon "to aid in the construction of a military road alternate sections of public lands designated by odd numbers, *three* sections per mile, to be *selected* within *six* miles of said road," providing "that any and all lands heretofore reserved to the United States by act of Congress, or other competent authority, be and the same are hereby reserved from the operation of this act."

The act makes no provision for the filing of map of definite location or general route, or for the withdrawal of lands, but provides:

That the lands hereby granted to said State shall be disposed of only in the following manner, that is to say, that when ten miles of said road shall be completed, a quantity of land not exceeding thirty sections for said road may be sold coterminous to said completed portion of said road, and when the Governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold coterminous to said completed portion of said road, and so from time to time until said road is completed.

According to the certificate of the Governor of Oregon the road opposite the land in question was completed *June 24, 1871*, and a map showing the definite location of said completed portion was filed in the General Land Office July 10, 1871.

On June 2, 1871, the Commissioner addressed a letter to the local officers at La Grande, Oregon, transmitting a diagram of said road within said district, ordering a withdrawal of the odd sections within the six mile limits as follows: "It is hereby directed that you withhold from disposal the odd sections thus falling within said designated limits and make note of such on your records."

It appears, however, that no notice of this withdrawal was received at the local office.

The township plat was filed in the local office April 24, 1874.

The company has not made selection of this tract, but now applies to be allowed to select it under their grant.

The claim of Rinehart is based on the following facts, found upon a hearing before the register and receiver January 19, 1884, ordered by your office to determine the status of the land.

James B. Keeney, a qualified pre-emptor, settled and lived upon this land from the fall of 1862 to September, 1870, and improved it to the

extent of \$1,500, when he sold his claim to the improvements to W. S. Glenn and plaintiff Rinehart. Glenn remained on the tract one year, and sold his interest to Myers, who in September, 1872, sold said interest to Rinehart.

Rinehart filed declaratory statement for this tract July 14, 1874, within three months after the filing of the township plat in the local office, alleging settlement July 14, 1872. The alleged settlement was from the date that Rinehart became the sole owner of the improvements. He continued to improve the tract, and his improvements are now alleged to be of the value of \$5,000. He is a qualified pre-emptor.

Counsel for the road contend that this was a present grant of every odd section of land within six miles of the road on each side thereof, and that after the completion of each ten miles of road, the right of the company attached as of the date of the grant to every odd section within six miles on each side of said completed portion, excepting only lands that had been reserved to the United States by act of Congress, or other competent authority, although the company was only entitled to make selection of three sections per mile, and that when such selections were made, the remaining odd sections reverted to the government by force of such selection.

As the line of the road could not definitely be known at the date of the grant, the practical effect of the construction contended for is that every odd section within the territory through which the road might pass was absolutely granted to the company, to enable it to locate their road and within the limits so located to select therefrom to the extent of three sections per mile any odd sections which had not theretofore been reserved to the United States by act of Congress or other competent authority. Hence, they argue that as pre-emption claims are not embraced within the exception of "lands reserved to the United States," they are not excepted from the operation of this grant as in other grants where such claims are expressly reserved and provided for; that it is within the power of Congress to grant lands covered by pre-emption settlements and filings, and that such lands are granted unless expressly reserved from the operation of the grant.

The supreme court of the United States, in the case of *Frisbie v. Whitney* (9 Wall., 187), and the *Yosemite Valley* case (15 Wall., 77), held that occupation and improvement of the public lands with a view to pre-emption do not confer a vested right in the land so occupied, nor does such right become vested under the pre-emption law, until the purchase money has been paid, and the receipt of the proper land officer given to the purchaser; but in these cases the court also held, that settlement and filing confer an inchoate right, which will be protected against the claim of other persons who have not an equal or superior right, although it is not a valid claim against the United States.

In the cases cited, Congress had expressly granted the specific lands in controversy. No specific lands were granted to the State of Oregon

to aid in the construction of this road, but simply a grant of three sections per mile, to be selected within the limits of six miles on each side of said road, when any ten miles of the same should be completed and certified to by the Governor. A settlement with a view to pre-emption on lands falling within the limits of the grant before the date of the grant being authorized by law, conferred an inchoate right on the settler against every one but the United States, and unless such lands were expressly and specifically granted, this inchoate right could not be defeated or pass to another by mere implication or intendment. Therefore, if it be conceded that the right of the company attached at the date of the grant to all lands from which selection might be made, that right of selection did not embrace lands on which settlement with a view to pre-emption had been made prior to and existing at the date of the grant, because such settlement being made under authority of law conferred upon the settler a right that could not be defeated or divested by the grant unless such lands had been specifically granted.

In this case Keeney, a qualified pre-emptor, settled upon the land in 1862, four years prior to the date of the grant, and continued to occupy and improve the land until 1870, when he sold his improvements to Glenn and the plaintiff Rinehart. Five years later Rinehart acquired by purchase the entire interest in the improvements, and has continued to improve the tract.

The township plat was filed in the local office April 24, 1874, and July 14, thereafter, Rinehart filed his declaratory statement.

Keeney's failure to file a declaratory statement and the sale of his improvements several years after his settlement does not prove that his settlement was a trespass and was not made with a view to pre-emption. The reasonable presumption is that his settlement was made in pursuance of law and not in violation of law. He could not signify his intention by the filing of a declaratory statement, because the township plat was not filed until 1874. In this respect the case differs from *Water and Mining Company v. Bugbey* (96 U. S., 165), and similar cases cited by counsel.

But I think it is clear that the grant to Oregon to aid in the construction of this road was not a grant of lands in place, or of specific lands, but a grant of quantity, to be selected from the odd numbered sections within certain boundaries to be fixed and defined by the construction of sections of road of ten miles each. Hence, the lands that Congress granted or intended to grant could only be ascertained when they were actually selected within the limits of six miles of the road, and for every ten miles of road constructed and certified to by the Governor, and until selection has been made, as aforesaid, the company's right does not attach to any specific tract of land.

The only questions remaining to be considered are whether the lands were by the act of certification of the completion of the road withdrawn from entry, or whether the department upon the filing of such certifi-

cate had the power to withdraw said lands from entry, and whether the filing of such notice in the local office was necessary to give effect to such withdrawal so far as to reserve the lands within the limits of said withdrawal from settlement and entry under the general land laws.

It will be seen that the act makes no provision for filing of map of definite location, nor for any withdrawal of lands from entry for the benefit of said road, but it is the completion of the road that gives position to the six mile limits within which selections may be made. It would however, be necessary to file a map showing the location of the road as definitely fixed by actual construction in order to determine what lands should be withdrawn. The road was completed opposite the land in controversy June 24, 1871, and a withdrawal from entry of the odd sections within the limits of six miles on each side of the road then completed was ordered by letter of June 2, 1871, but it is alleged that this letter was not received at the local office. On July 10, 1871, the company filed a map showing the definite location of this part of the road. At this date the land had not been surveyed and hence it was not known whether the land in dispute was an odd or even section.

On July 14, 1874, Rinehart filed his declaratory statement, alleging settlement July 14, 1872.

Counsel for the company contend that when any ten miles of said road has been completed and a map is filed showing the location of said constructed road, fixing the limits within which the right of selection may be made, such right of selection attaches to every odd section within the granted limits, and the right to make choice from the entire six sections after the certification by the Governor of the completion of the road is a right that can not be impaired or limited, and the location of the road by its own operation and vigor without any action of the executive withdraws the land from all disposition by the land department from the time the line of the road is made definite in the way contemplated by the act.

In support of this view the case of *VanWyck v. Knevals* (106 U. S., 336), and other similar cases, are cited to the effect that when the map of definite location is filed with the Secretary of the Interior "it then becomes the duty of the Secretary of the Interior to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others."

In the cases cited the grants were for every odd section within certain limits, and the filing of the map of definite location fixed and determined with precision the lands actually granted to the road without further action on the part of the road or the land department, so that the right of the road, at the date of the filing of map of definite location, absolutely attached to every odd section of land within the primary limits, whether the lands were withdrawn from entry or not.

But a different rule prevails in case of lands to be selected in lieu of those within the limits of primary location, which have been sold or pre-empted before the location is made. In such cases the right of the road attaches only from the date of selection, and the filing of the map of definite location does not of itself withdraw the land from entry, unless express provision is made therefor by the terms of the grant.

It is however contended that the grant under consideration was a present grant of an absolute quantity of lands, and not a grant of lieu lands within secondary limits where the quantity could not be known until the sections lost in place have been determined, and that the rule applicable to such grants does not apply in this case.

In the cases cited the filing of the map of definite location actually determined the quantity of lands lost in place. If the grant to aid in the construction of this road absolutely attached upon the filing of a map of definite location of the constructed road to every odd section within the limits from which they were entitled to select, by reason of the fact that the grant is for an absolute known quantity of land, I can see no reason why the same rule would not apply with equal force to lands in secondary or indemnity limits, in cases where the grantee is allowed to select lands for those lost in the primary limits, because the actual quantity of land that the road is entitled to select being absolutely determined by the filing of the map of definite location, upon the same principle the grant in such cases would at that date attach absolutely to every odd section within the indemnity limits for the purpose of enabling the company to make selections therefrom to supply the deficiency of lands lost in place. It is unnecessary to cite the numerous authorities to show that no such right attaches.

I am therefore led to the conclusion that the construction of the road and the filing of a map of definite location thereof does not cause the grant to attach to any particular tract of land, nor does it by its own operation withdraw from entry the lands within the limits fixed thereby.

The authority of the department to withdraw lands in the indemnity limits for the purpose of allowing the grantee to make selections, in the absence of express provision made therefor by the grant, has never been directly decided by the courts, but in several cases such authority seems to have been recognized by the supreme court, and such has been the ruling of the department.

In the case of the grant to the State of Illinois to aid in the construction of a road from Chicago to Mobile, no provision was made in the grant for the withdrawal of lands, but the Commissioner withdrew the lands for the purpose of allowing the State to make selections. This action of the Commissioner was considered approvingly in the case of *Clements v. Warner*, 24 How., 394. Again, in the case of *Riley v. Wells*, cited in *Wolsey v. Chapman* (101 U. S., 768), the court held that a withdrawal of lands from private entry "was sufficient to defeat a settlement for the purpose of pre-emption while the order was in

force, notwithstanding it was afterward found that the law, by reason of which this action was taken, did not contemplate such withdrawal."

The grant to aid in the construction of the Burlington and Missouri River Railroad was for ten odd sections per mile to be taken on the line of the road and in equal quantities on each side thereof. No limits were fixed by the grant, and the right of the road attached only by selection. In the case of the *United States v. Burlington and Missouri River Railroad* the court, construing this grant, said: "If as in the present case by its [the Land Department] neglect for years to withdraw from sale lands beyond twenty miles from the road, the land opposite any section of the road has been taken by others and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road." (98 U. S., 334.)

Such withdrawal however does not become effective until notice of the same has been filed in the local office. If the act of withdrawal could cause the grant to attach to any particular section or sections withdrawn, it might then be made effective without the filing of notice in the local office, but the only force and effect of such withdrawal is to prohibit settlements upon the lands withdrawn after giving notice thereof at the local office that such lands are withheld from settlement, until selections shall be made by the grantee.

Besides, the order of withdrawal itself clearly shows that it was the intention of the Commissioner that such withdrawal should not take effect until it was received at the local office, because the local officers were required to execute the order by withholding from disposal the odd sections falling within the designated limits, and to make note of such on their records. The right of the company therefore, depending upon an executive and not a legislative withdrawal, must be governed by the true intent and meaning of such withdrawal.

Prior to withdrawal these lands were subject to settlement under the pre-emption and homestead laws. The law provided that the records of the land office shall show what lands are subject to settlement and entry. This notice is intended for the benefit and protection of the settler, and settlement and improvement made in the absence of such notice or upon information and advice of the local officers, who have no knowledge of such withdrawal, cannot be defeated by the arbitrary choice of the road in making its selections, the grant not having attached at that time to any particular tract of land within said limits.

In view of the foregoing, I am therefore of the opinion—

1st, That the settlement of Keeney in 1862 excepted this tract from the grant of July 5, 1866, to aid in the construction of this road.

2d, That the settlement of Rinehart in 1872 was not affected by the withdrawal of the Commissioner of June, 1871, no notice of said withdrawal having been filed at the local office until after the alleged settlement of Rinehart.

Your decision is therefore affirmed.

It will be observed that the record in the case designates the land as the SW. $\frac{1}{4}$ of said section 29. After the argument had closed, it was discovered that the tract was improperly designated, and that the land involved is the NW. $\frac{1}{4}$ instead of the SW. $\frac{1}{4}$. Accordingly, counsel were notified of the error, and called upon to show cause why the error should not be corrected.

In response thereto, counsel for Rinehart consents to said correction and counsel for the road submit the question of correction to the Department, saying they will be content with the decision of the Department in regard to making said correction and will make no objection thereto. Letters of counsel to this effect have been filed with the record in the case. Being satisfied that the settlement of Rinehart is upon the NW. $\frac{1}{4}$ instead of the SW. $\frac{1}{4}$, and that the declaratory statement describes the land as the NW. $\frac{1}{4}$ of said section 29, the correction will be accordingly made in the record of your office.

PRACTICE—AFFIDAVIT OF CONTEST—JURISDICTION.

GOTTHELF v. SWINSON.

A contest affidavit is in the nature of an information, and when it has been accepted, notice issued, and service made thereof, jurisdiction is acquired.

If the affidavit of contest is defective, the jurisdiction is not affected thereby, and objection thereto can only be raised at the hearing.

Acting Secretary Muldrow to Commissioner Sparks, May 23, 1887.

July 14, 1881, Philip Swinson made timber culture entry No. 6423 of the SE. $\frac{1}{4}$, Sec. 15, T. 107 N., R. 57 W., Mitchell, Dakota, and September 19, 1883, Louis Gotthelf filed contest against the same on the charge of failure to comply with the law in the matter of breaking, etc. Notice was given by publication, and hearing had November 5, 1883. On the day of hearing the contestant filed an amended affidavit of contest charging the same as the former one, because the first affidavit had been sworn to before one of his attorneys in the case. The entryman defaulted. The evidence submitted showed that the entryman had failed to break or plow five acres of said land at any time subsequent to his said entry; that he failed to crop or cultivate any part of said land, and that said tract was then wholly unimproved, with the exception of about one and three-quarters acres broken in 1881. The register and receiver thereupon recommended the cancellation of the entry. Their judgment was sustained on appeal to your office, and the entry held for cancellation June 10, 1885. From this decision appeal is brought here.

The main point relied upon in the appeal is that the register and receiver did not have jurisdiction to issue notice on the first affidavit of

contest, because the same was sworn to before contestant's attorney. To this it is simply necessary to say that the contest affidavit is in the nature of an information: and when the register and receiver have accepted and acted upon the information tendered, by issuing notice to the defendant, when service is made, jurisdiction in the case is acquired. *Houston v. Coyle* (2 L. D., 58), *Butler v. Mohan* (3 id., 513). If the affidavit of contest be defective, such defect does not touch the question of jurisdiction; it is a matter that can only be excepted to at the hearing. Contests have been allowed where no affidavit has been filed at all, where the information upon which the local officers acted was merely verbal, or where it was reduced to writing, but not verified by the oath of the contestant. The rule requiring an affidavit to be filed by contestant when initiating his contest was only to assure the government of his good faith in the premises. It is always to the interest of the government that entries, in which the laws have not been complied with, should be canceled, and to that end legitimate contests are favored. But, if this were not so, in this case the amended affidavit filed on the day of the hearing cured any defect which might have existed in the former affidavit, and made the contest good beyond all question or doubt.

I see no reason for disturbing the decision appealed from, and the same is accordingly affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL; ACT OF MARCH 3, 1879.

BRADY v. SOUTHERN PAC. R. R. CO.

(On Review.)

As no vested right to any particular tract is conferred by indemnity withdrawal, and the existence of the same is dependent upon the will of the Secretary of the Interior, the Department may prescribe rules by which failure to assert the right of selection, as against a settler after withdrawal, will operate as a revocation thereof as to the tract involved.

The right of selection within indemnity limits is a preference right that may be asserted against every one, but failure to assert such right, after due notice of a settler's intention to make final proof for land within said limits, is a waiver of said right, and will, after proof and payment, estop the company from setting up the illegality of the entry.

Acting Secretary Muldrow to Commissioner Sparks, May 25, 1887.

In the case of the Southern Pacific Railroad Company *v.* Peter F. Brady, I held by decision of February 8, 1887 (5 L. D., 407) that where a settlement is made upon land within the indemnity limits of a railroad grant, withdrawn by order of the Secretary of the Interior, and notice of intention to make final proof is given in accordance with the act of March 3, 1879 (20 Stat., 472) the railroad company is required to appear at the local office and show cause why the entry should not be

allowed, and its failure to so appear and show cause at the time of making final proof shall be considered as a waiver of whatever right it might have acquired to the premises.

The railroad company has filed a motion for review of this decision, upon the ground that the land having been withdrawn for the benefit of said company, Brady's entry was illegal, and the failure of the company to appear and contest the entry could not make that lawful which by due authority is declared unlawful.

The issue presented by the motion is whether Brady's settlement upon that land was absolutely unlawful, for if we concede that it could never ripen into a right, it can make no difference whether the company protested or not. If it is not absolutely unlawful, I can see no reason why the Department may not prescribe rules by which the company shall be required to assert their claim at the date of making final proof, and upon failure so to do to be considered as having abandoned all right to claim said land.

These lands being within indemnity limits, the company have no vested right by reason of withdrawal, but their right to any particular tract can only become vested by selection made with the approval of the Secretary.

Having no vested right by virtue of withdrawal, and the withdrawal depending solely upon the will of the Secretary of the Interior, that withdrawal may be revoked at any time and the lands restored to entry at the will of the same official that made it.

Is there any reason why the Department may not prescribe rules by which the failure of the company to appear and assert its right or intention to claim any particular tract, that may have been settled upon, shall operate to revoke the withdrawal as to that particular section and to restore it to entry? If it is within the power of the Department to revoke the withdrawal as to all the lands, it surely has the power to revoke the withdrawal of a part of said lands, and the decisions of the Department that have crystallized into a general rule may become as effective for that purpose as the order of the Secretary directly withdrawing all the land.

All questions as to the preference rights of settlers to the public lands must be raised and decided in the local office, and a failure so to assert their rights and to bring the same before the General Land Office by appeal will estop them from afterwards asserting their rights. The right of the road to make selection in indemnity limits is nothing more or less than a preference right that they may assert against every one, but having notice of the intention of a settler to make final proof on any tract of land within said limits, and quietly looking on and allowing the settler to pay his money for the land without protesting and asserting their rights, will estop them from afterwards setting up the illegality of said entry, because their failure to assert their claim is

equivalent to a declaration that they do not intend to select that particular tract.

In the case of *Fox v. the Southern Pacific Railroad Company* (2 L. D., 558) the application to file for the land was rejected by the local officers, because it was within the indemnity limits of the withdrawal for said road. While this decision was proper, yet, if the entry had been allowed, it would not have relieved the company from the necessity of asserting its rights when the settler made application to prove up. Nor is the circular of May 26, 1883 (10 C. L. O., 95), cited by counsel with the case of *Fox v. Southern Pacific Railroad Company*, repugnant to this view.

The case of *Buttz v. Northern Pacific Railroad Company* (119 U. S., 55) involving the question of a legislative withdrawal in granted limits, is not applicable to this case.

The motion is refused.

PRIVATE CASH ENTRY; ERRONEOUS SURVEY.

E. W. HARRIS.

Land within the limits of the official survey of a private claim, in excess of the amount confirmed and patented, is not subject to private cash entry; and can only be disposed of after the survey has been duly amended.

Acting Secretary Muldrow to Commissioner Sparks, May 25, 1887.

I have considered the appeal of E. W. Harris from the decisions of your office, dated October 15, and November 20, 1885, refusing to allow his application to make private cash entry of lands in T. 4 N., R. 16 E., at the Detroit land office, in the State of Michigan.

The record shows that your office, on October 15, 1885, advised the local land officers, that the application of Mr. Harris must be rejected, for the reason that the lands applied for are within the lines of the official surveys of private land claims Nos. 302 and 310 confirmed to Joseph Ricard and Oliver Ricard, respectively, under the act of March 3, 1807 (Vol. 2, 437), as shown by Green's American State Papers, Vol. 1, p. 363 and 366; that said claims were surveyed in 1810 and patents were issued in 1812; that the side lines of said claims, as shown by the description in said patents, measuring from the St. Clair river, are fourteen chains less in length than the side lines shown by said official surveys; that any errors in said surveys should have been corrected by the surveyor general prior to the issuance of said patents, which should have corresponded with the surveys as finally adopted; and that not having been surveyed as public lands, said tracts are not subject to ordinary private cash entry.

Mr. Harris was duly advised of said action of your office, and in response to a letter of inquiry, addressed to the register of said office,

relative to the proper manner to have said lands made subject to private cash entry, your office, on November 20, 1885, directed the local land officers to advise Mr. Harris that his application for survey could not be further considered, for the additional reason that he does not claim to be a settler; that your office is not advised as to the status of said lands, whether occupied or not, and that if the public surveys were extended over said tracts he would not have a preference right of purchase; that said land could not be entered at private sale until it had been surveyed, duly advertised and offered for sale to the highest bidder; and no sale made at such offering. The only important question presented by said appeal is, whether said land is subject to private cash entry, and that question must be answered in the negative. If, as appears from the record, said private claim surveys embrace more land than was confirmed and patented to said parties, then the surveys should be amended in a proper proceeding, and after the same have been corrected, the land outside of the corrected surveys should be disposed of according to law, in such manner as to protect the interests of the United States and any bona-fide occupants thereof.

The decisions appealed from are correct, and they are hereby affirmed.

RAILROAD GRANT—DEFINITE LOCATION.

CENTRAL PACIFIC R. R. CO.

The joint resolution of April 10, 1869, fixed the common terminus of the Central Pacific and Union Pacific at or near Ogden, and required the former company to pay the latter for the construction of the road from said point to Promontory Summit. The Central Pacific thus became entitled to the granted lands between said points.

The line of the road was definitely located when the Secretary of the Interior notified the company of the receipt of the map showing the same, and of his "consent and approval to the location of said road according to the map and profiles."

Rights acquired by such formal definite location were not affected by the report of the commission subsequently appointed, or the action of the Department on said report.

Acting Secretary Muldrow to Commissioner Sparks, May 26, 1887.

I have considered the appeal of the Central Pacific Railroad Company from your decisions of September 16, December 11, 1885, holding for cancellation its selections of certain tracts of land in Sec. 31, T. 10 N., R. 2 W., Salt Lake City, Utah Territory.

It appears that the land office at Salt Lake City was opened March 9, 1869; on March 15, 1869, Charles W. Alexander filed pre-emption declaratory statement, claiming settlement four days before on the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$; that William P. Offley made homestead entry April 13, 1869, of lots 2, 3, and 8, which was commuted to cash entry June 3, 1869; that Orlando J. Hollister on April

12, 1869, made homestead entry of lots 7, 9, 10, and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, which was commuted to cash entry on June 3, 1869—all of said tracts being within said section, town and range. The entries of Offley and Hollister were canceled June 22, and October 13, 1871, respectively, because within the grant to said company; from this action no appeal was taken by the entrymen. On January 2, 1885, the described tracts were selected by said company as part of their granted lands. On September 16, 1885, you held said selection for cancellation; this action the company asked you, October 12, to reconsider; on December 11, 1885, you declined to reverse your former action, holding, as you did in your first decision, that the filing of Alexander and the entries of Offley and Hollister were made prior to the attachment of the rights of the company to the tracts in question. From this action the company on December 24, 1885, appealed.

Substantially, only two errors are specified: (1) Error in re-opening the cases of Hollister and Offley, which had been determined by your predecessor in favor of the company, which decisions became final, in the absence of an appeal; and (2) Error in holding that the claims of said parties had attached to the specific tracts prior to the definite location of the road of the appellant company opposite to them; or prior to the definite location, also opposite them, of the road of the Union Pacific Railroad Company, through which the appellant company also claims title as purchaser.

I am very clear that the doctrine of *res adjudicata* cannot be invoked as to the first alleged error.

The cases, in which the decisions of your predecessor were rendered, were causes wherein the issue was between the Central Pacific Company and the two entrymen, and as between those two parties and the company it was decided the company had the best right. No appeal having been prosecuted, those judgments became final and cannot be re-opened by you. Nor have you attempted to re-open those judgments.

The present case presents an issue between the United States and the appellant company as to which has right and title to the lands; and your decision is adverse to the company and favorable to the United States, holding that title to said tracts did not pass to the company under its grant; and it cannot affect the issue or nullify the judgment, because, in arriving at your conclusion, you find the filing of Alexander and the entries of Hollister and Offley excepted the tracts embraced therein from said grant.

The consideration of the second alleged error is environed with some difficulties, in order to clear up which a detailed statement is necessary.

By the act of July 1, 1862 (12 Stat., 489), the Union Pacific Railroad Company was incorporated and authorized to construct its road from a point in Nebraska westward to the west boundary of Nevada, there to connect with the Central Pacific Railroad of California. If the Union Pacific Company completed its road first to the California line, it was

authorized to continue the construction of the same on through California until it met the road of the Central Pacific Company; and the latter road, after completing its line across California, was authorized to continue the construction of its road through the Territories to the Missouri river upon the routes indicated, upon the same terms as granted to the Union Pacific until said roads meet and connect, so as to provide a continuous line of railroad from the Missouri river to the Pacific ocean. By this act, and the amended act of July 2, 1864 (13 Stat., 336), there were granted to the companies in the Territories ten alternate sections, designated by odd numbers, per mile on each side of said road, "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." It was provided under said acts that the company should file, within three years, a map of general route of said road, whereupon the Secretary of the Interior was to cause the lands within twenty-five miles of said designated route to be withdrawn from pre-emption, private entry and sale, and when any portion of the route was "finally located," the lands were to be surveyed and "set off" as fast as may be for the purposes of the grant.

By act of July 3, 1866 (14 Stat., 79), the Union Pacific with the consent of the Secretary of the Interior was authorized to locate and construct their road from Omaha, westward, in a continuous completed line until it should meet and connect with the Central Pacific; and the Central Pacific was likewise authorized to locate and construct its line eastward until it met the Union Pacific; with the right to each company to work three hundred miles in advance of their continuous completed lines, where expeditious construction so required because of tunnels and heavy cuts.

On April 28, 1865, a map of its general or designated route, westward to the California line, was received in this Department from the Union Pacific Company; and about the same time the Central Pacific presented a similar map of its route from Sacramento eastward "to Salt Lake." The route of the Union Pacific, as shown by its map, passed south of Salt Lake, more than twenty-five miles from the land in question, which was thus outside of the line of withdrawal. Therefore in no event could any right to the same have accrued to that company under said map.

On July 11, 1865, Secretary Harlan wrote to the Commissioner of the General Land Office:—

I enclose for your information and appropriate action in relation thereto a map filed in this Department by C. P. Huntington, Esq., Vice President, showing the general route of the Central Pacific railroad of California from Sacramento to Salt Lake. You will please return the map to this Department for filing.

On the next day, Commissioner Wilson returned the map and wrote to the Secretary an earnest letter, remonstrating against making a withdrawal under said map, as it was not properly authenticated, or based upon any surveys, but covered a vast body of unsurveyed land, the withdrawal of which he did not think was contemplated by Congress.

Nothing further seems to have been done in relation to the matter; but the records of this Department show that said map was sent to the General Land Office on February 5, 1871, and a diligent search among the records of your office has failed to discover or show any trace of it. I am therefore unable to ascertain whether the general route designated by it passed north or south of Salt Lake. If it passed south, the lands in question would be outside of the lines of withdrawal therefor. If north of the lake, they might have been within the limits of the twenty-five miles of withdrawal. But, inasmuch as the Union and the Central were to form one continuous line from east to west, the probabilities are both roads were located on the same line and passed south of the lake.

It is evident said map was not approved or accepted by the Secretary. He sent it to the Commissioner for "information and appropriate action," directing him to return it to the Department "for filing." And after its receipt from the Commissioner with his protest the map was never approved or any withdrawal made thereunder.

The route passing south of Salt Lake contemplated by, at least, the Union Pacific was abandoned prior to 1868, and a route passing around the northern end of said lake adopted by both roads.

On January 1, 1868, the Central Pacific filed a map of definite location, extending from Humboldt Wells, Nevada, eastwardly around the north end of Salt Lake, to Weber cañon, in Utah, a point but a short distance west of Echo cañon. The lands in question were within this location. On May 15, 1868, the Secretary accepted this map only for one hundred and forty miles—from Humboldt Wells, Nevada, to Monument Point, Utah—thus stopping the location of the road some twenty-five miles west of the land in controversy, and leaving them outside. On October 14, 1868, the Central Pacific Company filed another map of the same location from Monument Point eastward to Echo cañon, which was a little further eastward than Weber cañon. On October 20, 1868, Secretary Browning wrote a letter to Mr. Huntington, Vice President of that company, wherein the Secretary said:

I have received your letter of the 14th instant and accompanying map and profiles of the line of the Central Pacific Railroad of California, from Monument Point (north end of Salt Lake) to Echo Summit (head of Echo cañon); also reports of chief engineer and consulting engineer on same, with copy of the minutes of the board of directors of the company, adopting and approving the location of the line between those points. In view of the second section of the act of Congress, approved July 3, 1866, I hereby give my consent and approval to the location of said road, according to the map and profiles mentioned.

The lands in controversy are within the lines of this location.

Congress approved of the route thus located, and by joint resolution of April 10, 1869 (16 Stat., 56), it was provided "that the common terminus of the Union Pacific and the Central Pacific Railroads shall be at or near Ogden; and the Union Pacific Railroad Company shall build and the Central Pacific Railroad Company pay for and own the railroad

from the terminus aforesaid to Promontory Summit, at which point the rails shall meet and connect and form one continuous line."

Under the authority conferred by act of May 6, 1870 (16 Stat., 121), the common terminus and point of junction between the two roads was afterwards "definitely fixed and established on the line as located and constructed," on Sec. 1, T. 6 N., R. 2 W., about five miles north and west of Ogden, and about twenty-five miles east of the tracts in controversy, leaving them opposite to that part of the completed road which had been built by the Union, but belonged to the Central Company.

In your decisions you hold that inasmuch as the Union Pacific Company actually constructed the road as far west as Promontory Point, past and beyond the tracts involved, this company earned and is entitled to the said lands under its grant; and that as the Central Pacific only actually constructed its road as far east as Promontory Point, it was entitled to no lands beyond that point, by virtue of its grant, "as simple location of its line without construction of its road did not vest the company with any right to the lands between those points"; and it can have no claim to them except as a purchaser from the Union Pacific under the provisions of the resolution of 1869, *supra*.

Thereupon you set forth certain matters, which in your opinion show that the map of definite location of the line of the Union Pacific road, opposite this land, was not filed until after the attachment of the claims in question.

Whilst not fully concurring in the conclusion arrived at by you, as to the facts and dates in connection with filing of this last map, in the view I take of this case I do not deem it essential at this time to enter upon a discussion of them.

It is clear to my mind from the legislation recited that Congress meant to aid, by the grant of public lands, either of the two named companies which should first construct a road between the Missouri river and the Pacific coast; and if both companies attempted the construction, the one working from the east to the west and the other from west to east, each company was to be entitled to the benefit of said grant, so far as its road was constructed.

Under this grant and contract the work was commenced at both ends of the great line and the two companies made rapid progress towards each other. As this progress was made, naturally each company filed in advance a map of the definite location of its line of road. This served the double purpose of finally fixing the line of road and identifying the lands on each side to which the company constructing the road would be entitled. The race was one of diligence, and the company which first did the work would receive the reward.

When the roads were about to form a connection, thus making the continuous completed line from the Missouri river to the Pacific, the great object in view, Congress for the purpose of apportioning the grant

between the two roads, and possibly preventing discord and litigation, where the public interests required harmony and co-operation, passed the joint resolution of April 10, 1869, *supra*.

By this resolution it was declared that "the common terminus" of the two roads should be "at or near Ogden." To this "common terminus" the Union Pacific was restricted, though before authorized to build westward until it met the other road. Beyond this "common terminus" westward it could not go, and beyond it, it could claim nothing, or get nothing under the Congressional grant. To that "common terminus" the Central Pacific was entitled to come, but beyond it could not go. Being thus declared the terminus of the line of its road, it was beyond question entitled to the land granted in aid of the construction of its road to that point.

It is true that the same resolution says, "the Union Pacific Railroad Company shall build" the road "from the terminus aforesaid to Promontory Summit"; but it also says that the Central Pacific shall "pay for and own the railroad from the terminus aforesaid to Promontory Summit."

If Congress had not restricted its grant to the Union Pacific to the "common terminus" at Ogden, it would not have been necessary to require of it this special piece of construction, because otherwise full authority existed for the continuation of its road until it met the other, not yet at Promontory, and the same inducement was held out by the grant as a reward for each mile built, and therefore the new legislation would have been vain and useless.

Nor can we reasonably suppose that Congress intended that after the Union Pacific had built this fifty miles of road and received the land granted as a reward from Congress for doing so, it was also to receive from the Central Pacific the whole amount of its expenditures, whereby the Union Pacific Company would have become the owners of this portion of the land grant, without having paid for the road opposite. It is not possible for me to believe that such was the purpose of Congress; or, in view of the plain language used, that such is the effect of the joint resolution.

I therefore dissent from your views and hold that the land in controversy is within the granted limits of the Central Pacific and belongs to that company, if not excepted from its grant by the claims of Alexander, Offley and Hollister.

It has been shown that on October 14, 1868, a map of definite location of the line of the Central Pacific opposite to this land, was filed in in this Department; that on October 20, 1868, Secretary Browning notified the officers of said company of receipt of same, and of his "consent and approval to the location of said road according to the map and profiles mentioned."

I do not well see that plainer language could have been used to show "consent and approval to the location" of the road as shown by said map.

In the case of *Van Wyck v. Knevals* (106 U. S., 366), the supreme court says:

Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best. . . . But when a route is adopted by the company, and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and can not be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route.

Now, in this case, the route had been adopted, map thereof had been filed; the Secretary had accepted and approved it; the route was thus "established;" it was not "the subject of future change," either by the company, or the Executive, but only upon "legislative consent." No such legislative consent was ever sought or obtained, as to the portion of the road opposite to these lands, and the title to all such within the granted limits, as were free from claim at the date of this definite location, passed to the company.

After this plain and unequivocal acceptance by Secretary Browning of the route adopted by the company, Secretary Cox, in a letter dated March 17th, 1869, addressed to the Chairman of the Senate Committee on Pacific Railroads, said, in relation to the approval of said map:

It was believed this action did not confer upon that company an exclusive right of constructing its road over the located route, designated by the map then filed. The Department, from the lights then before it, simply approved that route. . . . Subsequently, a commission was organized to examine both roads, and to determine the most eligible location over the country lying between the completed tracks of each. Instructions were issued the 14th of January last . . . from which it appears that the 'approval' of the Secretary was regarded, not as a finality, but as still subject to his control, when he should be in possession of the report of a commission appointed in part to elicit and present all the facts requisite to a definite solution of the question.

The commission referred to subsequently reported to this Department and furnished a map of the line of road approved by them between the completed portions of the two roads. This new map adopted substantially the same line located by the Union Pacific and the Central Pacific, and the new map in no way changed the status of the lands in controversy. After receiving the report and map of this commission, the Secretary on April 28, 1869, directed a withdrawal of the land contiguous to the line of the road, within the prescribed limits, as shown by said map. You insist that at the time of the acceptance by the Secretary of this last map for the first time was "determined the line of the road," and "the route became established."

In this view I most certainly do not concur.

The acceptance of the map by Secretary Browning was unequivocal and unconditional. And the statement of Secretary Cox that the ap-

proval was intended to be a qualified one is not borne out by the language used, which can hardly be made plainer or stronger, to express an unqualified approval. Nor does the fact of the appointment of the commission strengthen his views or yours.

That commission was appointed, so far as I can find, without direct authority of law, and consequently its action in attempting to make definite location of these roads, was not binding upon any one. Its action therefore was purely advisory to the Secretary, and was intended to assist him in determining as to the best point for making a junction between the constructed portions of the two roads; an implied power to determine which was perhaps conferred upon him by Congress. The exercise of this power could not and did not affect the vested right of the company to lands along the line already definitely and formally located, and which location was not changed by the subsequent action in joining together the tracks of the two roads.

I therefore find that the line of the Central Pacific was definitely located opposite the lands in question October 20, 1868, and then being free from claim, title to them vested in said company at that time.

I reverse your judgment and direct the approval of selections of the company.

SURVEY—CONTRACT—RATE OF PAYMENT.

HARRY S. CHURCH.

Payment of augmented rates is not warranted except on conclusive showing of the plat and field notes.

The price fixed for the original survey of exterior lines should be allowed for retracing and re-establishing such lines, where the contract authorizes such work but does not fix the price therefor.

Acting Secretary Muldrow to Commissioner Sparks, May 26, 1887.

I have considered the appeal of Harry S. Church, United States deputy surveyor, from your decision of February 26, 1887, rejecting his claim to additional compensation of \$4.00 per mile for exterior lines and \$2.00 per mile for subdivisional lines, augmented rates in lieu of minimum rates allowed by your office.

From this decision claimant appeals, alleging three grounds of error, to wit:

First. It was error to hold that "Lava Flow" is not comprehended in the term mountainous.

Second. It was error to hold that standard, meridian, or township lines could be or were exterior lines, the retracement or re-establishment of which might be necessary for the proper execution of the surveys named in his contract.

Third. It was error to conclude that the field notes do not warrant payment of any of these rejected claims.

The claim to the increased rate for exterior lines is for township and principal meridian lines, retraced and re-established by authority of the following clause in the contract, to wit: "and to retrace and re-establish such exterior lines as may be necessary to properly execute the surveys herein."

No provision is made by the contract for the rate to be paid for retracing exterior and meridian lines, nor is there any provision in the circular of instructions with reference thereto; but the contract provides that the deputy surveyor shall receive—

As full compensation for all work performed under this agreement at the rate of \$9.00 for base, standard, meridian and meander lines; \$7.00 for township lines, and \$5.00 for section lines, except where the lines of survey pass over mountainous lands, or lands heavily timbered or covered with dense undergrowth, and in such cases at the rate of \$13.00 for base, standard, meridian and meander lines; \$11.00 for township lines, and \$7.00 section lines per mile, for every mile and part of a mile actually run and marked in the field, random lines and offsets not included.

Having authority under the contract to retrace and re-establish exterior lines, where necessary for the proper performance of the contract, payment should be allowed for such service at the stipulated rate provided for the survey of exterior lines, provided the retracing and re-establishing of such lines "was necessary to properly execute the surveys contracted to be performed."

You will therefore adjust this account in accordance with this view, and if upon further examination you are satisfied that said exterior lines were retraced and re-established and that such work was necessary in order properly to execute the surveys, the increased rate will be allowed.

The claim to the increased rate, based on the theory that "Lava Flow" is comprehended in the term mountainous, was properly disallowed.

The instructions accompanying the contract and made part thereof provide that "both plats and field notes must conclusively show the character of the country to be such as will admit of the payment of the augmented rates named in the appropriation act, otherwise only the minimum will be allowed."

As there is no evidence before me showing that the lands surveyed are "mountainous lands, or lands heavily timbered, or covered with dense undergrowth," I affirm your decision rejecting the claim for increased rate upon this ground.

RAILROAD GRANT—INDIAN COUNTRY.

NORTHERN PAC. R. R. CO. v. OSTLUND.

The rule of adjustment adopted by the Department in the matter of settlement rights acquired on lands lying along Goose river, which formerly constituted the northern boundary of the "Indian country" claimed by the Wahpeton and Sisseton Sioux, recognizes that legal settlement north of said stream draws to it, on release of the Indian title, the constituent portion of the legal subdivision on which it was made.

Legal subdivisions of odd numbered sections lying south of said stream inured to the Northern Pacific grant on the extinction of the Indian title.

Acting Secretary Muldrow to Commissioner Sparks, May 26, 1887.

By letter of March 11, 1886, you allowed Jonas Ostlund to file declaratory statement for the NE. $\frac{1}{4}$ of Sec. 33, T. 146 N., R. 51 W., Fargo, Dakota.

From that action appeal has been taken by the Northern Pacific Railroad Company.

The land is within the limits of the withdrawal for said company ordered March 30, 1872, on map of general route, and also within the granted limits as defined on map of definite location of May 26, 1873.

It appears that claimant settled on the tract on July 5, 1871, that he is a qualified pre-emptor, and the head of a family, that he built a dwelling house, stables, and other buildings, broke sixty acres, and put the same in crop, and has maintained a continuous residence on the tract since settlement. His settlement was prior to survey, the plat having been filed January 8, 1874. The company selected the tract July 7, 1883.

The Goose river divides the tract, flowing eastwardly through the north half. That river forms the northern boundary of the "Indian country," formerly claimed by the Wahpeton and Sisseton bands of Sioux Indians. The south half of the quarter section and a portion of the north half fall within said Indian country. The remainder of the tract was open public land at date of settlement. The Indian title to the lands south of said river was extinguished May 2, 1873, after the withdrawal on general route, and prior to definite location.

The method of disposing of the claims of settlers along said river, such as is here presented, was determined by this Department in its decision of July 29, 1880 (unreported). The company proposed that "in adjusting the claims of settlers upon odd sections on the north of the river, outside the former reserve, who settled prior to the withdrawal of February 21, 1872, and are thus legally entitled to enter, that where by the survey a portion of the smallest legal subdivision embraced by such claim be found to extend across the unmeandered stream and include a portion of the former Indian lands to which settlement rights could not attach, such portion may be awarded to the settler if it be less than one-half the area of the legal subdivision, but if it be more than one-half, the subdivision shall be awarded to the company."

Your office recommended, in view of the decision in the Hogland case (5 C. L. O., 107), that the proposition be accepted as an equitable and practicable adjustment, in order to avoid the expense of allotment, and the meandering of the stream. Said Hogland case held that the lands in said Indian country inured to the grant on definite location; when the Indian title (existing at the date of the grant, and the withdrawal on general route) had been extinguished prior thereto, and that settlement upon said Indian lands could confer no right. The Secretary refused to accept the proposition of the company, and said:

I think the true rule will be to recognize the legal settlement on the north of the stream as drawing to it at the moment of release of the Indian title the constituent portion of the legal subdivision upon which it was made, and permit the settler to include it in his pre-emption. . . . If the residence of the settler was upon the Indian lands, of course he can have no right of pre-emption, although his settlement may have been upon a legal subdivision, some portion of which may by the survey extend north of the river, and upon which his residence, if established thereon, would have been legal.

I am unable to discover that this method of disposing of such lands has been departed from, and inasmuch as it originated in a proposition from the company for an equitable disposition of the lands thus peculiarly situated, I am of opinion that the claim in question may be properly disposed of in accordance therewith. I am unable to ascertain from the record what portion of the claim is covered by the settlement of Ostlund. You will therefore order a hearing to ascertain that fact. If the settlement is north of the river, claimant will be allowed to file for the north half of the quarter section, if south of the river, the tract will go to the company. In any event, the right to the south half of the quarter section is in the company under the decision in the case of *Buttz v. Northern Pacific Railroad*. (119 U. S., 55.)

Said decision is accordingly modified.

RULES OF PRACTICE—MINING REGULATIONS—APPEAL.

STEIN ET AL. *v.* FISHER.

The circular instructions and regulations in force, relative to the several classes of claims under the public land laws, are intended to be in consonance with the law, and with the rules of practice, and to operate in harmony therewith.

In case of hearing ordered under mineral circular of October 31, 1881, the provisions of the rules of practice, with respect to appeal, must be followed.

Acting Secretary Muldrow to Commissioner Sparks, May 26, 1887.

On the 26th of March last an application was filed in this Department in behalf of Balsarah Stein *et al.*, for certification, under rules 83, 84 and 85 of practice, of the record in the matter of cash entry, No.

1224, made June 7, 1883, by Joseph Fisher, upon the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 9, T. 8 N., R. 3 W., Helena, Montana.

It appears that your office by its decision, dated October 22, 1883, held said cash entry for cancellation as to the west thirty acres covered thereby, said thirty acres having by a previous decision of your office been adjudged mineral on evidence taken at a regular hearing.

An application, accompanied by affidavits in support of the allegation therein contained that the land is non-mineral in character, having been filed for a review of the decision above mentioned, your office, on May 8, 1884, re-opened the case, and ordered a further hearing, putting upon Fisher the cost of notices and the burden of proof.

The parties to said hearing claiming that a portion of the land entered by Fisher is mineral in character were Henry B. Wade *et al.* The register and receiver upon the evidence taken at the hearing found the land to be agricultural in character, which finding was in effect an award to Fisher, so far as their judgment went.

The record having been transmitted to your office, it was there examined and by decision, dated December 22, 1886, no appeal having been taken from the finding of the register and receiver, their action was approved and declared final, and the case was closed.

February 24, 1887, appeal was filed by the present applicants from your said office decision, but your office declined to recognize said appeal, basing its refusal on rule 48 of practice, and holding that thereunder, no appeal having been taken from the decision of the local office, the same became final as to the facts involved. Hence the application for certiorari.

In said application it is claimed that the general rules of practice have no application to this case, but that it is governed by the provisions contained in the general mineral circular approved by this Department October 31, 1881; that the rules denominated rules of practice "are *general* rules, applying to all cases *except* such as may be under other instructions specifically provided for." Applicants then proceed to set out generally what the mining circular of October 31, 1881, prescribes as the rules governing hearings to establish the character of lands, that is, whether they are mineral or non-mineral, and say that, although directions are given in regard to citation, publication, the taking of testimony, etc., nothing "is said in reference to the necessity of either party taking an appeal." This is true. They might with equal truthfulness have stated that the mining circular makes no provision for appeal from your office to this Department, and yet the right of appeal, when properly asserted, has always been recognized in mineral claims as well as in others, and applicants are now here asserting their right of appeal.

The rules of practice are intended to govern proceedings "in cases before the United States district land offices, the General Land Office,

and the Department of the Interior." This case certainly comes within the purview of the rules as thus defined.

The circular instructions and regulations in force relative to the several classes of claims under the public land laws are intended to be in consonance with the law and with the rules of practice, and to operate in harmony therewith.

But conceding for the moment that the mineral circular is intended to govern independently of the rules of practice, in so far as it particularizes in relation to proceedings before the local offices, such fact certainly does not prevent the application of the general rules as to matters and steps in the proceedings in regard to which the particular rules are silent. The very fact of silence in a particular rule remands the question not covered by such particular rule to the general rule which does embrace it.

Under a different view there would be no provision for appeal in cases to which the mineral circular is applicable, either to your office or to this Department, since said circular is silent on both these points. If the right of appeal be recognized in one case, it must be in the other, and in both under the rules of practice, rule 43 of which provides that "appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office," citing sections 453 and 2478 of the Revised Statutes. If allowed, then the conditions prescribed by the rules of practice, under which appeal may be taken, must be complied with. In this case they were not complied with, and the action of your office refusing to recognize the appeal, for the reason that no appeal had been taken from the action of the local office on a question purely one of fact, was proper.

The final point made by applicants that, even if it should be held that under the rules they are not entitled to the right of appeal, your office had no authority to dismiss the appeal, but should have received and forwarded the same to this Department for its action, is not tenable, nor is it supported by the case of John M. Walker *et al.*, decided by this Department on the 17th of March last (5 L. D., 504), and cited by counsel as authority for their position. In the discussion of that case, it was expressly stated that it did not contemplate cases in which the Commissioner "shall decide that a party has no right of appeal," for they are specially provided for in rules 83, 84 and 85.

In this case, it has been decided by your office that the right of appeal does not exist, and the rule in the Walker case, instead of being applicable as sustaining the position of counsel, distinctly excepts cases like this and remands them to the provisions of rules 83, 84 and 85, above mentioned.

Upon a careful consideration of the whole matter as presented, I find nothing which in my judgment calls for supervisory action by this Department, and the petition is denied and transmitted herewith, for the files of your office.

HOMESTEAD—RESIDENCE—CREDIT FOR MILITARY SERVICE.

ELIZABETH C. BARTLETT.

If the soldier was discharged on account of disability existing prior to enlistment, actual length of service, not term of enlistment, determines the amount of time to be deducted from the required period of residence.

Acting Secretary Muldrow to Commissioner Sparks, May 26, 1887.

I have considered the appeal of Elizabeth C. Bartlett from your office decision, dated December 16, 1885, rejecting her final proof and holding for cancellation homestead entry, No. 24501, made March 27, 1883, by her late husband Benjamin P. Bartlett, upon the SW. $\frac{1}{4}$ of Sec. 14, T. 101, R. 68, Mitchell Dakota.

Final proof was offered by appellant as the widow of the applicant. It was taken April 16, 1885, after due notice by publication, before a clerk of the district court, and was accepted by the register and receiver, who issued final certificate April 20, 1885.

When the matter came before your office for action, the entry was by the decision appealed from held for cancellation.

Said decision found the proof "not only meager and unsatisfactory in the matter of improvements and cultivation, but it fails to show compliance with the law in regard to residence."

It appears that final proof was offered a little over two years after date of entry, but in making said proof appellant claimed credit for three years military service by her husband, and put in evidence on that point the certificate of discharge, showing that the soldier, Benjamin C. Bartlett, had, after an enlistment for three years and a service of seven months, been discharged for disability. Your office called upon the War Department for a report of Bartlett's military service. That report was duly received and is in the record. It appears therefrom that the soldier was enlisted August 16, 1862, to serve three years, or during the war; that he was mustered into the service October 1, 1862, and that he was discharged March 16, 1863, on certificate of disability, which shows that the disability on account of which he was discharged "existed prior to enlistment."

Section 2305 of the Revised Statutes provides that—

The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or, if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served, etc.

Your office correctly held in the decision appealed from that "the claimant is only entitled to credit for the seven months actual service," for, as already indicated, the War Department records show that the soldier was discharged for a disability which existed prior to enlist-

ment, and which consequently was not incurred in the service and line of duty.

Conceding good faith in the matter of residence and improvements, the proofs are insufficient, for the whole period between entry and final proof added to the seven months actual military service would amount to less than three years, whereas the law requires five years residence in order to acquire title. For this reason the final proof must be rejected.

I do not, however, find any such evidence of bad faith as in my judgment would justify the cancellation of the entry. It is true the proofs are meager, but they show residence, and that the entryman died on the land on the 14th of December, 1884, a year and nine months after entry. The fact that appellant claimed the benefit of the full three years term of her husband's enlistment does not impugn or reflect upon her good faith, for she acted upon information contained in the discharge certificate, which stated that the soldier had been discharged for disability, but omitted to state that said disability existed prior to enlistment.

Your office decision is modified. You will suspend the final certificate, and give appellant an opportunity to in due time make new proof, showing full compliance with the law.

PRACTICE—CASE MADE SPECIAL; COMMUTATION.

LAMBERT v. FAIRCHILD.

When a case is ready for consideration under the rules of practice it may be advanced on the docket without notice to either party.

Failure to establish residence within the required period under the homestead law will not, in the absence of any intervening adverse right, defeat the right of commutation.

Acting Secretary Muldrow to Commissioner Sparks, March 17, 1887.

Marshall E. Lambert has filed a motion for review of my decision of December 17, 1886, upon the following grounds:

1st, Because said decision is contrary to the facts in the case and the law;

2d, Because it was rendered in violation of the rules of the Department and of the rights of Lambert under said rules.

The second ground of error is predicated upon the fact that this case was made special upon the application of counsel for Fairchilds, and decided in advance of its regular order.

The rules of practice provide that the appellee shall be allowed thirty days from the expiration of the time allowed for appeal in which to file his argument, and that appellant shall be allowed thirty days from service of argument of appellee to file argument strictly in reply. After

the filing of the latter argument, the case is always in order and may be disposed of by the Department at any time without further notice to either party. An application or motion to have a case made special need not be served on the opposite party, and is not of the character of motions referred to in rule 92.

Counsel for Lambert complain that the motion to advance the case was an additional argument on the merits of the case which was not served on them. The paper was considered only so far as to determine whether it presented sufficient reasons for advancing the case.

As counsel have failed to show that they were in any manner prejudiced by the advancement of the case, the decision should not upon this ground be reconsidered.

As to the ground that the decision is contrary to law and the evidence, the case is briefly this: Fairchild made homestead entry December 4, 1882, and improved the tract, the improvements consisting of a house, barn and chicken house and some clearing, valued at from \$1000 to \$2000. Prior to March 15, 1884, he lived in the town of Pomona, going on the tract occasionally. Since which time, he has resided thereon continuously, with his family, except for a period of six weeks in July and August, when he was taken seriously ill in Pomona, and his wife came from the homestead to take care of him. September 22, 1884, he offered commutation proof, when Lambert filed a contest and applied to make timber culture entry. Your office directed a hearing thereon, which was had before the register and receiver January 29, 1885, and on March 26, thereafter, they rendered their joint opinion that Fairchild's residence had been continuous from March 15, 1884, to date of hearing, except for the period of six weeks above mentioned. Your office affirmed this decision, holding that from the testimony Fairchild is entitled to purchase under section 2301 of the Revised Statutes. Counsel for Lambert insist that the finding of fact is, that Fairchild made his homestead entry December 4, 1882, and did not establish residence upon the land until March 15, 1884. From this fact it is argued that if there was a failure to comply with the homestead law, a commutation of that entry could not be allowed.

It may be admitted that, although Fairchild made his homestead entry December 4, 1882, and improved the land, he did not establish residence upon the land until March 15, 1884. But there was sufficient proof to show that Fairchild maintained a continuous residence on the tract from March 15, 1884, for more than six months prior to offering to purchase under section 2301 of the Revised Statutes, and that section provides that he shall make proof of settlement and cultivation as provided by law granting pre-emption rights.

There being no contest filed against Fairchild's entry until after he had offered commutation proof, it was held by the Commissioner that he was not required to show compliance as to residence beyond the

time required by the pre-emption law, and this has been the uniform ruling of the Department.

Although there may have been no proof of cultivation at the time of offering final proof, except as to clearing, there was proof of cultivation submitted at the hearing, and as this fact was proper to be considered by the local officers and the Commissioner to determine the good faith of the entryman, and they being satisfied upon the proof submitted, I see no reason for disturbing their decision.

The motion is denied.

PRIVATE CLAIM—CONFIRMATION—PATENT.

LUCY B. ABBOTT.

By the act of May 23, 1830, were confirmed all claims and titles to lands in Florida under the quantity of one square league, recommended for confirmation and contained in the reports referred to Congress January 14, 1830, except such claims as were confirmed by the Spanish government after January 24, 1818.

The specific exception of certain claims embraced in said reports, from the operation of said act, is conclusive that all other claims so reported and recommended for confirmation, were confirmed thereby.

Under the act of 1832, patents to land claims in Florida, confirmed by Congress, issue to the assignee of the confirmee on production of regular chain of title.

Acting Secretary Muldrow to Commissioner Sparks, May 27, 1887.

By letter of March 28, 1887, you rejected the application of Lucy B. Abbott for United States patent to lands in the city of St. Augustine, Florida, known as the Noda Concession. From this action she appealed.

The tracts involved are claims numbered 9 and 13, known as the Noda Concession, embraced in report No. 11 of the register and receiver at St. Augustine, Florida, acting as commissioners under the act of May 23, 1828, entitled "An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida." (4 Stat. 284).

The fourth section of the act of May 8, 1822 (3 Stat., 707), for ascertaining claims and titles to land in Florida, provides—

That every person or the heirs or representatives of such persons, claiming titles to land under any patent, grant, *concession*, or order of survey, dated previous to the 24th day of January, 1818, which were valid under the Spanish government, or by the law of nations, and which were not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file before the commissioners his, her, or their claim, setting forth particularly its situation and boundaries, if to be ascertained, with the deraignment of title where they are not grantees or original claimants but any claim not filed previous to the thirty-first day of May, 1823, shall be deemed and held to be void and of none effect.

Section five of said act then provides that the commissioners shall have power to inquire into the justice and validity of the claims filed

with them, and "They shall examine into claims arising under patents, grants, concessions and orders of survey, where the survey has been actually been made previous to the 24th of January, 1818, whether they are founded upon conditions, and how far those conditions have been complied with; and if derived from the British government, how far they have been considered valid under the Spanish government; and if satisfied that said claims be correct and valid, shall give confirmation to them. . . . And provided, That they shall not have power to confirm any claim or part thereof when the amount claimed is undefined in quantity or shall exceed 1000 acres, but in all such cases shall report the testimony with their opinions to the Secretary of the Treasury to be laid before Congress for their determination."

The act of May 23, 1828, supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, provided "That the said register and receiver shall continue to examine and decide the remaining claims in East Florida, subject to the same limitations, and in conformity with the provisions of the several acts of Congress for the adjustment of private land claims in Florida, until the first Monday in December next, when they shall make a final report of all claims aforesaid in said district to the Secretary of the Treasury."

Acting under authority conferred upon them by this act, the register and receiver on January 29, 1829, addressed a letter to the Commissioner of the General Land Office, transmitting their final reports on land claims in East Florida. These reports were numbered from 1 to 16, inclusive, and embraced all claims decided by them, whether rejected or recommended for confirmation.

In their letter of transmittal they say: "No. 11 contains a list of twenty claims situated within fifteen hundred yards of the fortifications of this city, between the North and St. Sebastian's Rivers, and held by the same tenure, viz: "That the party should settle on and possess the land until it should be reclaimed by the government for military purposes." These claims we have no power to confirm, but for the reasons attached to the abstract we have recommended them for confirmation." Report No. 11 embraced in this general final report contains a list of twenty claims, among which are the claims involved in this application, known in said report as claims numbers 9 and 13, and described as follows:

No.	Name of present claimant.	Name of original claimant.	Date of concession.	Quantity of land.	By whom conceded.	Remarks.
* 9	* Jose Noda	* Jose Noda ...	* Feb. 9, 1808.	* 85 yards	* White	* Right hand side of the road.
* 13	* Jose Noda	* Jose Garcia ..	* July 20, 1807.	* 4 acres	* do	* do

To this report is appended the following recommendation :

The above lands were all granted in the same manner and under the same conditions, to wit: That they should *revert* to the government whenever required for the military defence of the place. As we presume that the present government will never need them for the purposes specified, we recommend that the title of the United States be relinquished in each case to the several claimants.

C. Downing, Register,
W. H. Allen, Receiver.

These several reports of said commissioners, including Report No. 11, were transmitted to Congress for its action January 14, 1830, by the Secretary of the Treasury.

Congress by an act approved May 26, 1830 (4 Stat., 405), entitled "An act to provide for the settlement of land claims in Florida," by the first section of said act provides :

That all claims and titles to land filed before the register and receiver of the land office, acting as commissioners, in the district of East Florida, under the quantity contained in one league square, which have been decided *and recommended for confirmation*, contained in the reports, abstracts and opinions of said register and receiver transmitted to the Secretary of the Treasury according to law and referred by him to Congress on the 14th day of January, 1830, *be and the same are hereby confirmed*, with the exception of such claims as were confirmed by the Spanish government subsequent to the 24th day of January, 1818, which shall be examined, and reported with the evidence by the register and receiver before the next session of Congress to the Secretary of the Treasury to be laid before Congress.

You declined to issue the patent applied for by Miss Abbott, for the reason that claims are not confirmed. You further held that, "Miss Abbott, and those from whom this color of title descends from Noda, undoubtedly have had equitable and prescriptive rights in the tracts in question, but the fee is in the United States, and further legislation by Congress is necessary to divest the title of the government."

Your decision was presumably based upon the decision of Commissioner Williamson, in his letter of March 25, 1879, rejecting the application for patent to claims numbered 8 and 11 of Mary Ann Davis, embraced in said report No. 11.

In that case the Commissioner held that, "In order to substantiate a confirmation under this act" (referring to the confirmatory act of May 26, 1830,) "of the claims embraced in report No. 11, it is necessary to show that they are claims and titles to land," and that they "have been decided and recommended for confirmation by said register and receiver."

Again he says: "This report No. 11 shows that the claims embraced in it are not for land, but for its use, and are not claims which have been decided and recommended for confirmation by the register and receiver, but that they are claims that these commissioners recommended that the United States relinquish their title thereto to the several claimants."

A reference to the act of May 26, 1830, shows, "That all confirmations of land titles under this act shall operate only as a relinquishment of the right of the United States to said lands respectively."

These claims were reported to Congress, with other claims by letter of January 14, 1830. Special attention was called to the character of these claims by the commissioners; they were under the quantity of one square league, and were recommended for confirmation.

The act of Congress of May 26, 1830, confirmed all claims and titles to land under the quantity contained in one square league, recommended for confirmation and contained in the reports, abstracts and opinions of the commissioners referred to Congress January 14, 1830, except such claims as were confirmed by the Spanish government subsequent to January 24, 1818. Claims coming within this exception were embraced in report No. 1, and were confirmed by the decision of the commissioners. The fact that Congress specifically excepted certain claims embraced in said reports from the operation of the act, is conclusive that all other claims embraced in said reports under the quantity of one square league and recommended for confirmation were confirmed.

As confirmatory of this, these lands were in 1863 sold for taxes under the act for the collection of direct taxes in insurrectionary districts within the United States and purchased by the government. In 1872 the government for and in consideration of \$216.97, the amount of penalty and cost, executed to Miss Abbott a certificate of release, satisfactory evidence having been produced that she was legally entitled to said property.

It appears from the records that in 1835 deputy surveyors Ben. and J. B. Clements made a survey of claims numbered 9 and 13 as the lands confirmed to Joseph Noda by said act of May 26, 1830. A plat of this survey, with a certified copy of the description of said survey from the files of the United States surveyor general's office at Tallahassee, Florida, has been filed with the papers in the case. This survey seems to conform to the description of the concession to Noda in report No. 11, but the original on file in your office does not appear upon its face to have been approved, although filed with other plats containing the approval of the commissioners.

If there is no objection to this survey, and if you are satisfied that it correctly describes the land confirmed, you will cause it to be approved; otherwise you will direct a survey to mark the boundaries of said claim as shown by the report of the commissioners, and other evidence of file in your office.

The act of January 23, 1832 (4 Stat., 496), directs that patents to land claims in Florida confirmed by Congress shall, upon production of a regular chain of title from the confirmer, issue to the assignee of the confirmer. You will therefore upon the approval of a survey of said claims cause patent to issue to Miss Abbott, if satisfied that she holds under regular chain of title from the confirmer Joseph Noda.

SWAMP LANDS—BOIS BLANC ISLAND.

STATE OF MICHIGAN v. ERICKSON.

The field notes of survey are not conclusive except when showing the character of each smallest legal sub-division.

Acting Secretary Muldrow to Commissioner Sparks, May 28, 1887.

On February 25, 1886 (4 L. D., 415), I rendered a decision in the case of W. H. Cushing and thirty-seven other homestead claimants against the State of Michigan, directing a hearing to determine the character of the land embraced in said entries, situated on Bois Blanc Island, Reed City Land District, Michigan, claimed by the State as swamp lands. In this case the State claimed that its right to these lands is established by a survey of said lands made in 1827, showing that said lands are swamp lands within the meaning of the swamp land grant. The Department in the decision referred to held that the survey of 1827, relied upon by the State, did not furnish satisfactory evidence of the character of the land in each smallest legal sub-division, and hence a hearing was ordered to determine this question.

Under said ruling the case of Charles Erickson, one of the appellants in the case above referred to, and who had made application to enter Lot No. 1, Sec. 4, and Lot No. 8, Sec. 3, Bois Blanc Island, under the homestead law, came on to be heard before the register and receiver, who after hearing evidence touching the character of said land, decided, "That the witnesses for the State made but a partial examination of said lots, and stated that the greater part of each of said lots was swamp land, basing their judgment from the timber thereon, and at the same time were unable to find any great amount of water on said lots." "2. That the witnesses for the claimants stated positively that said lots—the greater part of each legal subdivision of the same—was dry land, fit for cultivation and not swamp or overflowed land." "That we are of the opinion that the State of Michigan has not by the proof established its claim to said lots, and that the State is not entitled to the same under the act of Congress."

Your office affirmed this decision, and from your decision the State appealed.

It is claimed by the State that the survey of 1827 does show the greater part of this land to be swamp and overflowed in each smallest legal subdivision, that the decision of the Department of February 25, 1886, does not amount to a denial of their right to have said survey considered as evidence, and that if said survey shows the greater part of each smallest legal subdivision to be swamp and overflowed, it should be accepted as conclusive evidence of the fact, unless overcome by convincing and uncontradicted proof to the contrary.

The survey of 1827, not being made with reference to the act of 1850, granting to the several States lands swamp and overflowed, and unfit for cultivation without artificial drainage, did not pretend to show the character of each smallest legal subdivision. It is true, as claimed by the State, that the field notes show to what extent the lines of survey passed over dry land, and to what extent they passed through what the surveyor denominated swamp, but they do not show the character of the greater part of each smallest legal subdivision within said lines of survey.

It was chiefly for this reason that the Department held that the survey did not furnish satisfactory evidence of the character of said land.

Considering, however, the survey of 1827 in evidence, and admitting for the sake of argument that it shows the greater part of each smallest legal subdivision to be swamp and overflowed, the testimony adduced on the hearing impeached the survey by the most satisfactory and convincing proof.

The substance of the testimony of Michael Marley, the first witness introduced by the State, is contained in his answers to the following questions, propounded to him:

Q.—What kind of lands were they there? (Referring to these lots forty or fifty years ago.)

A.—There was a little ridge close to the beach and from there to the lake it was low.

Q.—Did water stand there in the spring of the year?

A.—I don't know.

Then having answered that he recently examined part of the lots south of Lake No. 1 with Mr. Patrick, another witness for the State, he was asked the question—

Did you find any swamp land south of Lake No. 1?

A.—I found low land.

Q.—What is called swampy land? A.—Well, it is cedar land, low land and all kinds of soft wood.

Q.—Could it be cultivated without drainage in the spring when you put in crops? A.—I don't know.

Q.—How much water did you find on the land? A.—I did not find any.

In his cross-examination he answered that he had never seen any water on those lots at any time.

This is substantially the testimony of all the witnesses for the State in this case, as well as in the other case heard at the same time.

On the contrary, the witnesses for the claimant testify that with the exception of "five acres of low, wettish land on lot 8, and about ten acres on lot 1, section 4," it is dry land and not too wet for cultivation.

The testimony, therefore, fully sustains the finding of the register and receiver that the claim of the State that these lands are swamp and

overflowed is based upon the character of the timber growing thereon, and not from the actual swampy character of the land, while the testimony of the claimants show that the greater part of each legal subdivision is dry land, fit for cultivation, and not swamp or overflowed.

Your decision is affirmed.

HOMESTEAD ENTRY—CONTIGUITY.

HUGH MILLER.

A tract of land which merely corners upon another is not "contiguous" thereto within the intent and meaning of section 2289 R. S.

Acting Secretary Muldrow to Commissioner Sparks, June 2, 1887.

I have considered the case arising upon the appeal of Hugh Miller from your office decision of November 6, 1885, rejecting his application to make adjoining homestead entry of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 18, T. 23 N., R. 8 W., Nachitoches district, Louisiana.

The only question involved in this case is, whether a tract of land which merely *corners* upon another tract is "contiguous" therewith, within the meaning and intent of the last clause of Section 2289 of the Revised Statutes.

The word "contiguous", as used in the administration of the land department, means something more than merely touching at the corners. In the case of C. M. Coventry, who applied to transmute a pre-emption filing to a homestead entry, but who had filed for tracts cornering upon each other, your predecessor, Commissioner Williamson, said (November 30, 1878):

It is a regulation of this Department, co-existent with the pre-emption law itself, and *one that has never been departed from* in the adjudication of pre-emption cases,—

that tracts entered thereunder should be "contiguous," and that tracts cornering upon each other were *not* contiguous. Said case being appealed to the Department, Mr. Secretary Schurz, on December 18, 1880, affirmed the decision of your office, saying (2 C. L. L., 570):

These tracts, though cornering upon each other, are not contiguous. The latter word, as used in the administration of the land laws, means that different subdivisions of land shall be in contact with each other, *side by side*.

I see no reason for disturbing this settled construction and uniform practice of your office and the Department, and therefore affirm your decision in the case at bar.

PRACTICE—TIMBER CULTURE CONTEST—JURISDICTION.

HENYAN v. GREEN ET AL.

There is no statutory provision requiring a contestant to make a tender of entry fees and commissions when filing application to enter with his affidavit of contest. The law does not sanction such a requirement, and a failure to comply therewith would not affect the rights of the contestant.

Lawfully acquired jurisdiction is not divested by the act of the contestant whereby, prior to hearing, he becomes disqualified to make entry under the application filed with his contest.

Acting Secretary Muldrow to Commissioner Sparks, May 28, 1887.

I have considered the appeal of John M. Henyan from your decision of June 26, 1885, refusing to allow him to contest the timber culture entry of one Frederick J. Smalzried, on the NE. $\frac{1}{4}$ of Sec. 3, T. 111 N., R. 68 W., Mitchell, Dakota Territory, and holding that said quarter-section was subject to entry by the first legal applicant.

Alexander Green, who contested said entry and who has, it appears, since your decision made a homestead entry on said quarter-section, is the party adversely interested, and appears by his attorneys on appeal.

The material facts to be considered in the case, and about which there is no dispute, are as follows:

On January 18, 1882, one Frederick J. Smalzried made a timber culture entry on said land. On October 18, 1883, Green initiated a contest against said entry, and made application to enter the land under the timber culture act of June 14, 1878, and also made affidavit of his qualification to make such timber culture entry, but did not claim, or show, that he was qualified to enter the same under the homestead law.

On January 20, 1885, Green made timber culture entry on another quarter section.

On January 27, 1885, he submitted proof in the contest case against Smalzried, and the local land officers subsequently recommended that said entry be canceled.

On the 20th day of February following the appellant Henyan presented to the local land officers his corroborated affidavit, in which he swore that Green was not a qualified entryman under the timber culture laws; also his application to make a timber culture entry on said land, accompanied with a tender of entry fees and commissions, an affidavit of qualification, and an affidavit of contest against the Smalzried entry. He then moved to have Green's contest dismissed, and asked to be allowed to contest the Smalzried entry. This motion was overruled, the request denied, and an appeal taken to your office by Henyan, wherein various errors are assigned.

On appeal from your decision of June 26, 1885, the errors assigned are substantially:

1st. That you erred in holding that a tender of the entry fees and commissions was not essential in order to give Green a right to contest said entry.

2d. That you erred in sustaining the register's action in overruling appellant's motion to dismiss the Green contest and to permit appellant to contest the Smalzried entry.

3d. That you erred in dismissing Henyan's appeal, in canceling the Smalzried entry, and in holding said quarter-section subject to entry by the first legal applicant. And—

4th. That you erred "in not awarding the tract to John M. Henyan as the first legal applicant."

Alexander Green, by his attorneys, submits the case without argument, and insists that he was qualified to initiate and prosecute to a final determination said contest, and had the option, after he had procured the cancellation of said entry, to enter said land under the homestead laws.

There is no provision of the statute which requires that a contestant of a timber culture or any other entry should make a tender of the entry fees and commissions at the time of initiating contest and making application to enter the land involved in the contest. If the practice once prevailed in the land office of requiring such tender, it was without the sanction of law and a failure to make it can not in any manner affect the rights of the contestant.

Green's contest having been properly instituted, and the local land officers having lawfully acquired jurisdiction of the case, they were not divested of such jurisdiction by Green having subsequently, and before the hearing of the case, made a timber culture entry on other lands and thus divested himself of the right to enter the lands involved in the contest under the specific act mentioned in his application.

There has been, in the opinion of the Department, no error committed by your office the correction of which could in any manner benefit the appellant. Had Green been disqualified to make homestead entry, and had some outside party been permitted to enter the land without notice to the appellant, quite a different question would be presented by the record. The appeal is dismissed.

MINING CLAIM—NOTICE OF APPLICATION.

EMPEROR WILHELM LODGE.

Notice of application for patent should give the course and length of a line connecting the claim with a corner of the public surveys, or with a mineral monument.

Acting Secretary Muldrow to Commissioner Sparks, June 3, 1887.

Pursuant to departmental letter of the 4th instant, you on the 21st instant transmitted the papers in the case of J. W. Mills *et al.*, claimants for the "Emperor Wilhelm" Lodge, Lake City, Colorado.

Your office, by decision dated August 31, 1886, required the claimants to publish a supplemental notice of their application for patent, for the statutory period, etc., because from the description in the first notice the locus of the "Emperor Wilhelm" lode could not have been ascertained by parties who might have had adverse claims.

The notice was given December 26, 1882, and the material part of it is as follows:

Beginning at a corner number 1, a post of regulation size marked 1 X 1309, and witnessed by a rock in place marked 1 X—bearing S. 68° W. 4 feet. From this corner number 3 of survey 1087, the George M. Tibbets Lode, E. W. Olney *et al.* claimants, bears S. 87° 40' W. 647.4 feet, etc.

The claim is bounded by Wyoming Lode, which is a south-westerly extension of this claim. None others known.

It does not appear that the Wyoming Lode ever went to entry, and the George M. Tibbets Lode was not patented until March 6, 1884. It thus appears that, in the language of your office decision, "the notice of application for patent omits to give the course and length of a line connecting said claim with a corner of the public surveys or with a mineral monument;" and that therefore it was insufficient in law. It did not describe the claim so that it could have been ascertained by any one who might have had an adverse claim against it.

The decision of August 31, 1886, is affirmed, and claimants will be required to publish a supplemental notice of their application as therein directed.

RAILROAD GRANT—FORFEITURE AND CONFIRMATION—ACT OF FEBRUARY 8, 1887.

INSTRUCTIONS.

Commissioner Sparks to register and receiver, New Orleans, La. June 6, 1887.

I have to call your attention to the act of Congress approved February 8, 1887, (copy attached), entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes."

The first section of the act declared a forfeiture of, and restored to the public domain, all lands lying east of the Mississippi River which were granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company by act of March 3, 1871, and also of all those on the west side of the river lying opposite to and coterminous with that part of the road which was completed on the 5th day of January, 1881, or that portion between New Orleans and White Castle.

The second section confirms to the New Orleans Pacific Railroad Company the title to the lands granted by said act of March 3, 1871, and not declared forfeited by the 1st section, but provides that all of the lands that were occupied by actual settlers at the date of the definite location of the road and were still in their possession or in the possession of their heirs or assigns, should be held and deemed excepted from the grant and subject to entry under the laws of the United States. This provision applies to the patented as well as to the unpatented lands.

The Department has decided that the dates of the definite location are specifically determined by the act of February 8, 1887, to-wit: October 17, 1881, for the portions of the road from a point in Township 2 N., Range 1 E., to a point in Township 4 N., Range 2 W., and from Shreveport to a point in Township 10 N., R. 12 W., and November 17, 1882, for the balance of the road. The twenty-mile lateral limits of the grant and the terminal limits of each of the sections as definitely located and constructed are shown by yellow shading upon the diagram furnished you with office letter of October 15, 1883. When claimants under this section present proper applications to enter, you will notify the company thereof, and allow thirty days within which to file objections. If no objection is made within the time allowed, you will allow the entry, and in making your returns thereof you will transmit, with the entry papers, the documents showing the previous action taken.

If the company should object, you will order a hearing in the usual manner, and, upon the conclusion of the trial, transmit the testimony to this office accompanied by your joint opinion thereon.

The third section provided that the confirmation of the grant made by the second section should take effect when the company should accept the provisions of this act in the manner prescribed, and agree to discharge all the duties and obligations imposed by the act of March 3, 1871.

The acceptance and agreement on the part of the company were filed with the Secretary of the Interior, April 20, 1887, and the relinquishment and confirmation of the grant provided for in the second section of the act went into effect on that day.

The fourth section directs the Secretary of the Interior to establish such rules and regulations, in issuing patents for the lands confirmed to the company by this act, as will enable persons who were in actual occupancy of any portion thereof on December 1, 1884, and who are qualified preëemption or homestead claimants, to secure title to the land held by them not to exceed one quarter-section in quantity and not less than one sixteenth of a section, on payment to the company at the rate of two dollars per acre for the land occupied; one-third to be paid in cash and the balance in such equal annual installments as the Secretary of the Interior shall prescribe.

The fifth section directs the Secretary of the Interior to make all needful rules and regulations for carrying this act into effect, and author-

izes him to direct that payments for lands purchased under the fourth section may be made in any number of annual installments, not exceeding four, from the date of the sale, with interest thereon, not to exceed six per centum per annum.

Upon the receipt of any proper application to purchase under the fourth section of the act, you will notify the company thereof and allow thirty days within which to file objections.

If no objection is made the applicant will be held and deemed to have a valid claim and right of purchase in the land applied for, and you will so notify the company. Should the company object, you will order a hearing and proceed as directed under section 2.

The sixth section of the act authorizes and instructs the Secretary of the Interior to apply the provisions of the second, third, fourth, and fifth sections to any lands that have been patented under the railroad grant of March 3, 1871, and to protect any and all settlers on said lands in all their rights under said sections.

In all cases under section 2 where the rights of entry under the laws of the United States shall have been fully established to lands which have been patented to the company, the latter will be required to reconvey such lands to the United States, to the end that no cloud may rest upon the title of the entryman.

In cases where the right of purchase under the fourth section of the act shall be established, the railroad company will be required, either to convey the land to the applicants upon receipt of the first payment and secure itself for the deferred payments by liens upon the lands sold, or to enter into such contracts to convey the lands upon receipt of the final installment paid in the manner below prescribed, as shall be satisfactory to this office.

The fourth section prescribes that purchasers thereunder shall pay one-third of the purchase money in cash. Under the authority given the Secretary of the Interior, the balance of the purchase money shall be paid in four equal annual installments from the date of the sale, and interest on the deferred payments shall be at the rate of six per centum per annum.

Purchasers coming within the provisions of this section may at any time make payment of the whole, or any equal annual installment of the purchase money.

Application to enter under the second section, and to purchase under the fourth section, should be accompanied by the corroborated affidavit of the claimant setting forth the facts respecting his settlement and residence upon, and cultivation of the land claimed.

Approved June 8, 1887 :

H. L. MULBROW,

Acting Secretary.

TIMBER CULTURE ENTRY—NATURAL GROWTH.

KELLY v. THORPE.

That the natural growth of timber is restricted by annual fires does not render the land containing such growth subject to timber culture entry.

Acting Secretary Muldrow to Commissioner Sparks, June 7, 1887.

I have considered the case of James W. Kelly v. Garrett L. Thorpe, on appeal by Thorpe from your office decision, dated October 31, 1885, holding for cancellation his timber culture entry, No. 2967, made August 6, 1883, upon the SE. $\frac{1}{4}$ of Sec. 20, T. 149 N., R. 42 W., 5th P. M., Crookston, Minnesota.

Kelly filed his affidavit of contest December 27, 1884, charging that the section in which the tract covered by said entry is situated had on it at the date of entry large quantities of forest trees of natural growth, to wit, about ten acres of poplar and balm of gilead trees, ranging in height from ten to thirty feet and in diameter from two to eight inches. If this charge be true, or approximately true, the entry made by Thorpe is illegal, because made upon land not subject to entry under the timber culture law.

A hearing was ordered and had March 2, 1885, at which both parties were present in person and by counsel.

A considerable amount of testimony was taken, upon a review of which the register and receiver recommended that the contest be dismissed for the reason that in their opinion "nature has not provided what in time will become an adequate supply of timber for the wants of the people likely to reside on that section."

Your office decision appealed from found the testimony very conflicting, but found for contestant and held the entry for cancellation, for the reason that it is established that the section is not devoid of timber.

From that decision claimant appeals, assigning four specifications of error, which in substance amount to an averment that the evidence failed to sustain the allegations in affidavit of contest, and that the entry was valid and legal under the rulings of the Department in force when it was made, and should be allowed to stand even though under present rulings a like entry would not be permitted. As to the character of land subject to entry under the timber culture law, the statute is very explicit. It requires the applicant in every case to swear that "the section of land specified in my (his) said application is composed exclusively of prairie lands, or other lands devoid of timber."

It is admitted that there are trees in considerable number on the section, and therefore that it is not "exclusively prairie," or "devoid of timber," but it is averred that they are small and scattered, and that they do not render the section of such a character as to make the entry in question illegal under the rulings in force at the date it was allowed by the local office.

As the Department is slow to forfeit or infringe any rights acquired in good faith under former rulings and under an interpretation of the law different from that now in force, it becomes necessary to scrutinize very closely the evidence in the case in the light of the practice and the interpretation given the law at and about the time of the entry. The testimony on both sides shows that there are trees on the section. No witness estimates the number. The evidence as to the size of the trees and the area of ground covered by them is conflicting. Testimony for contestant is to the effect that they range from one to thirty feet high; that they stand in groves in different parts of the section, and that altogether there are on said section ten acres and more of timber—poplar, balm of gilead and willow—some of which is on the quarter covered by the timber culture entry. Thorpe and his witnesses, however, testify that the groves referred to are not timber, but mere brush, the stems of the largest of which do not exceed four inches in diameter, covering altogether not to exceed an acre or two.

The claimant has never seen the land but once. His knowledge can not therefore be very exact.

The adjoining and surrounding sections of land have on them more or less timber. Within two or two and a half miles east, according to claimant himself, is heavy timber. Cord-wood in the vicinity of the land in question is worth from one to three dollars a cord, according to different witnesses. This would indicate that there is no scarcity of timber in the locality. The most of the timber in section 20 is on the NW. $\frac{1}{4}$ thereof, and that is plowed around by the occupant of that quarter to protect it from fires. It is evident that occupants regard the timber as worth saving.

Claimant testifies that the groves present the appearance of having been periodically damaged by fire, and says that if protected from fire the trees would develop into trees of ordinary size. While most of the timber is small, it seems quite evident that if protected from fire it will grow and increase rapidly.

The very testimony offered by contestee to show that much of the so-called timber is really brush and sprouts of one or two years' growth is in view of all the facts and circumstances evidence against him, and goes to confirm the view that if protected from fire the land would in a few years have on it a strong growth of valuable timber, for in spite of fires, which have heretofore swept the section, the young timber pushes itself up and continues to grow. Poplar and balm of gilead, which compose most of the timber on the section in question, are naturally of rapid and strong growth.

This case is in many respects like that of *Box v. Ulstein* (3 L. D., 144), decided by this Department in October, 1884, and on the theory advocated for this claimant, viz: that of the probability of the natural growth proving adequate for the supply of the wants of the people likely to reside on the section.

In that case, as in this, the timber was mostly poplar and balm of gilead, which stood in groves or thickets, and was styled by the claimant "brush."

It was there urged that most of the trees were small and young, and that some of them had been injured and destroyed by fire. But to this the Department said it "does not change the fact that nature has already done all that the timber culture act was designed to accomplish." That decision ended by directing the cancellation of Ulstein's timber culture entry. The reasoning of that case is quite appropriate to this.

A careful examination and consideration of the whole record discloses no reason for disturbing the conclusion arrived at by your office. On the other hand, my judgment is that even applying the very liberal rulings which prevailed in the land department about the time this entry was made, it is because of the character of the land, not such as could properly be allowed to stand.

Your office decision is therefore affirmed.

RAILROAD GRANTS IN CONFLICT; PRIVATE CLAIM.

GORDON v. SOUTHERN PAC. R. R. CO.

The claim to the Azusa Rancho was *sub judice* until patent issued thereon, and land within the claimed limits thereof was in reservation until that date.

Under section 23 of the grant of March 3, 1871, lands embraced within the indemnity withdrawal for the Atlantic and Pacific Railroad were excepted from the grant to the Southern Pacific.

Acting Secretary Muldrow to Commissioner Sparks, June 7, 1887.

I have considered the case of John T. Gordon v. the Southern Pacific Railroad Company on appeal by the latter from your decision, dated January 5, 1885, rejecting its claim to certain lands hereinafter described.

It appears from the record that Gordon, in September, 1884, applied to enter under the homestead laws lot 2 of Sec. 27, lot 6 of Sec. 22, the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 23, T. 1 N., R. 10 W., S. B. M., Los Angeles, California. The local office rejected his application, because "a portion of the tract applied for is within the limits of the withdrawal for the Southern Pacific Railroad Company."

Your decision states that the tracts in the odd numbered sections are within the limits of the grant of March 3, 1871, to the Southern Pacific Railroad Company, branch line, as shown by the map designating the route of said company's road, filed in your office April 3, 1871, in accordance with which lands were ordered withdrawn by letter of April 21, 1871, received at the local office May 10, 1871.

You found that said tracts were also within the thirty mile indemnity limits of the grant by the act of July 27, 1866, to the Atlantic and Pacific Railroad Company (14 Stat., 292), as shown by said company's map

of designated route filed in your office March 12, 1872, the withdrawal on which was ordered by your office letter of April 22, 1872, received at the local office May 7, 1872.

Gordon claims that the land covered by his homestead application was formerly within the exterior boundaries of the Azusa rancho and was thereby excepted from the operation of the railroad grant.

Of course, the railroad company makes no claim to that portion of the land covered by Gordon's homestead application, which falls in the even numbered section.

Lot 6 of Sec. 22 is therefore not in controversy in this case.

As to the residue of the land applied for by Gordon, it appears that the Southern Pacific Company, on the 25th of February, 1883, selected lot 2 of Sec. 27 and the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 23, and it claims the right under its grant to all the land described in said Sec. 23.

Your decision finds from an examination of the maps and diagrams on file in your office that lot 2 of Sec. 27 and the greater portion of the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 23 fell within the claimed limits of the Azusa rancho, as surveyed by George H. Thompson in 1868, but were excluded therefrom by the Hancock survey, which was approved and patented May 29, 1876. You therefore hold that said tracts were *sub judice* at the date when the grant to the Southern Pacific Railroad Company became effective by the filing of its map of designated route in April, 1871, and also at the date of the indemnity withdrawal for the benefit of the Atlantic and Pacific Railroad Company, the order for which reached the local office May 7, 1872. So holding, your conclusion is that said lot 2 in Sec. 27, and the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 23 were excepted from the grant to the Southern Pacific Company, and from the withdrawal for the Atlantic and Pacific Company, and were subject to disposal as public lands.

After a careful examination of the maps and diagrams, I find that all of lot 2 in Sec. 27 and the major portion of the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 23 fall within the Thompson survey of the Azusa rancho, and I concur in your conclusion that said tracts were within the claimed limits of said rancho, and did not pass to the Southern Pacific Company under its grant, nor were they withdrawn for the benefit of the Atlantic and Pacific Company. In the case of *Sansom v. Southern Pacific Railroad Company* (4 L. D., 357), it was held by this Department that the claim to the Azusa rancho was *sub judice* until May 29, 1876, when patent issued thereon, and that lands within the claimed limits thereof were in reservation until that date.

As to the remaining portion of the land claimed by Gordon, to wit, the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 23, you decide that the Southern Pacific Company can have no rightful claim for the reason that said tract is within the indemnity limits of the grant to the Atlantic and Pacific Company by act of 1866. You base your decision on this point on the

proviso contained in Sec. 23 of the act of March 3, 1871 (16 Stat., 579), making the grant to the Southern Pacific Company—

“That this section shall in no way affect or impair the right, present or prospective, of the Atlantic and Pacific Company, or any other railroad company.”

In the case of *Sansom v. the Southern Pacific Railroad Company* (supra), it was found by the Department that the Azusa rancho, “as originally claimed and granted, embraced all land having for its boundaries the Sierra, or mountain on the north, the western lines of San Jose, and San Jose addition on the east, the road of San Jose (which seems to be platted as San Bernardino road) on the south, and the Azusa, or San Gabriel river, and the boundary of Andres Duarte on the west.”

I am inclined to think from an inspection of the maps before me that a critical examination of the maps, diagrams and diseño in the Azusa rancho record would show this tract to be south of the “Sierra, or mountain on the north,” and consequently within the Azusa rancho as claimed, and for that reason excepted, like the other tracts described, from the grant to the one railroad, or the withdrawal for the other.

But, if this be not true, and the tract be, as your decision treats it as being, outside of the reservation on account of the Azusa rancho, your conclusion, based on section 23 of the granting act of March 3, 1871, is, in my judgment, correct, and the company appellant got no right to the tract under its grant.

In the case of the Texas Pacific Railroad Company and Southern Pacific (Branch Line) Railroad Company (4 L. D., 215), this Department had occasion to consider the effect of the proviso above quoted from Section 23 of the act of 1871.

In the opinion of the Assistant Attorney General in that case, which opinion was adopted by the Department, the following language was used relative to said proviso:

It is difficult to see how it would have been possible more clearly to except said lands from the operation of said grant to the Southern Pacific than by providing that the latter grant should not “affect or impair the right, present or prospective, of the Atlantic and Pacific Company, or any other railroad company.”

What was there said is fully applicable to the branch of this case now under consideration and to the tract in question. The SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 23, if not within the exterior boundaries of the Azusa rancho, was embraced within the indemnity withdrawal for the Atlantic and Pacific Company, and gave to that company a prospective right which excepted the tract from the Southern Pacific grant.

This disposes of all the subdivisions embraced in Gordon's homestead application.

Your decision holding in effect that the Southern Pacific Railroad Company has no title or valid claim to any of the tracts herein described is confirmed.

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DESERT LAND ENTRY—CONTEST—APPLICATION.

JEFFERSON *v.* WINTER.

A preference right of entry is accorded to one who by the initiation of contest secures the cancellation of a desert land entry.

Application to make desert land entry accompanied by the purchase money constitutes a segregation of the land.

Acting Secretary Muldrow to Commissioner Sparks, June 7, 1887.

I have considered the case of Ira A. Jefferson *v.* Timothy J. Winter, as presented by the appeal of the former from the decision of your office, dated October 2, 1885, holding for cancellation his desert land entry No. 927 of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 27, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of Sec. 22, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 21, T. 1 N., R. 2 W., made June 2, 1884, at the Salt Lake City land office, in the Territory of Utah.

The record shows that on June 3, 1884, said Winter offered his application to enter said tracts under the act of Congress approved March 3, 1877 (19 Stat., 377), and said application was rejected by the local land officers, for the reason that the land had been appropriated by the prior entry of said Jefferson. Thereupon, Winter asked the register and receiver to reconsider their said action, which they refused to do. From the action of the local land officers rejecting his said application to enter said tracts, Winter duly appealed to your office, alleging that the prior entry of Jefferson was illegal, because received by the register after the close of the local land office on June 2; that the appellant's application was the first legal application for said land, and that it should have been allowed.

On July 24, 1885, your office directed the local land officers to report all of the circumstances attending the making of said entry by Jefferson. In compliance with said order, the register on September 9th following reported that on June 20, 1877, one Levi P. Luckey made desert land entry No. 125 of said tracts; that on June 11, 1883, said Jefferson filed his affidavit of contest against said entry, alleging abandonment and non-compliance with the requirements of said act; that said contest affidavit was transmitted to your office and on October 3, same year, said entry was held for cancellation; that no appeal having been taken, after due notice to the claimant, said entry was canceled by your office letter, dated May 22, and upon the receipt of said letter of cancellation by the local land office, said Jefferson was permitted to make his said entry on June 2, 1884. The register further reported that both Jefferson and Winter employed attorneys in the city of Washington, D. C., who notified them by telegraph when said letter of cancellation was mailed; that said letter was delayed several days, on account of breaks in the railroad, and reached the local land office on the evening of June

2d, about eight P. M.; that after the distribution of the mail the register was accosted on the street and asked to go to the office, and swear the claimant and his witnesses to his entry papers; that he consented to do so, as he had never refused to accommodate claimants by allowing them to execute their papers out of office hours; that said papers were left in the local land office on the night of June 2d, and not actually recorded and the certificate issued until the morning of June 3d, when they were recorded as of the date when they were received and sworn to; that the application of Jefferson was received in accordance with the practice of said local land office, established by the predecessor of the then register, and followed by him until the instructions of your office to Inspector Hobbs, on September 4, 1884 (11 O. L. O., 178), prohibited such practice.

Your office, on October 2, 1885, considered the appeal of Winter and held that Winter had the prior right, because the application of Jefferson was made after office hours, and it was therefore illegal.

From the foregoing, it is apparent that Jefferson had the preference right of entry of said land. He had filed his affidavit of contest against the former entry, and it was upon his information that the same was canceled. This fact under the decision of this Department in the case of *Fraser v. Ringgold* (3 L. D., 69), gave him a preference right of entry of said tract. When said application of Jefferson was received by the register the land was vacant public land, subject to entry, and, irrespective of the preference right of entry secured by the act of Congress approved May 14, 1880 (21 Stat., 140), said application of Jefferson, the purchase money having been received prior to any other application, served to segregate said land and operated as a bar to the reception of another application. *Sarah Renner* (2 L. D., 43); *Thorpe et al. v. McWilliams* (3 L. D., 341); *Florey v. Moat* (4 L. D., 365).

A careful examination of the whole record shows no good reason why the action of the local officers should not be affirmed.

The decision appealed from is therefore reversed.

SIOUX HALF-BREED SCRIP—RE-ISSUE IN SMALLER DENOMINATION.

S. L. M. BARLOW.

At any time prior to location forty-acre scrip may be substituted in place of scrip of a larger denomination.

Acting Secretary Muldrow to Commissioner Sparks, June 10, 1887.

In the matter of the application of the Hon. S. L. M. Barlow of New York City, for the exchange of certain pieces of Sioux Half Breed scrip of one hundred and sixty acres each, for scrip of the denomination of forty acres each, which accompanied your letter of 25th May last and which was referred to the Hon. Asst. Attorney-General for

this Department for an opinion thereon, that officer under date of 9th instant communicates his views to this Department (copy herewith), to the effect that he sees "no legal objection to substituting forty acre scrip in place of scrip of a larger denomination at any time before the latter is located."

Under date of 3rd instant Mr. J. H. Parsons of this city as attorney for Mr. Barlow, filed in this Department three pieces of Sioux Half Breed scrip, viz:—

No. 356, "D" for 160 acres, Louis Langie,
 " 323, "D" " 160 " Roseau Bruquier,
 " 323, "E" " 160 " " "

which letter and scrip are herewith enclosed together with his statement in the case of 7th instant.

In view of the opinion of the Hon. Assistant Attorney-General, above referred to, you are hereby instructed to cancel the said scrip, and issue new scrip of the denomination of forty acres each in lieu thereof and transmit the same to Mr. Parsons.

SCHOOL INDEMNITY—SELECTIONS IN COLORADO, IN LIEU OF MINERAL LANDS IN SECTIONS SIXTEEN AND THIRTY-SIX.

CIRCULAR.

Commissioner Sparks to registers and receivers in Colorado, March 23, 1887.

Appended are the seventh section of the act of March 3, 1875, granting lands to Colorado for schools; the fourteenth section of said act, providing for the sale of the lands to create a school fund; the fifteenth section of the same act, excepting mineral lands from the grant; and the first and second sections of the act of April 2, 1884, providing that the State shall be allowed to select lands in lieu of such of the sixteenth and thirty-sixth sections as may have been or shall be found to be mineral lands. Respecting school indemnity selections on mineral bases under the act of 1884 you will be guided by the following instructions:

1. A determination by the Secretary of the Interior, or a decision by this office or the local officers, which becomes final under the Rules of Practice, that a school section or a part thereof is mineral land, and that the title thereto is not in the State, will place the land in the class of bases that may be used in selections of land as indemnity.

2. All the lands in said sections sixteen and thirty-six returned as non-mineral must be presumed to be school lands for the purposes of this act until the presumption is overthrown in the manner hereinafter indicated. The bare return of lands as mineral by the surveyor-general will not be regarded as conclusively classifying them as mineral, the returns of deputy surveyors as to the character of the land surveyed having been found in many cases to be indefinite or erroneous.

3. In the absence of a decision by this Department that land in a school section is either mineral or non-mineral in character the State may proceed in one of three ways to have her rights and title defined, as follows:

(a) By applying to the Secretary of the Interior through the proper district office, where the land has been returned as non-mineral, for his certificate that the land was rightly so classed when the grant took effect. Such certificate will "determine the matter" and establish the title of the State beyond attack by mineral claimants. Notice of such proceeding must be given by publication and posting, in the manner prescribed by the Rules of Practice.

(b) By proceeding to prove land which has been returned as mineral to be in fact non-mineral in the manner prescribed in Circulars "N" of September 23, 1880, and October 31, 1881.

(c) By relying upon the record for indemnity where lands have been entered as mineral. Where the State authorities have information that the mineral character of tracts in sections 16 and 36 is shown by evidence in this office, a list of them may be sent here, through the proper district office, to determine whether they may be used as bases for selections. If the decision should be in the negative, the character of such tracts may be determined under the procedure indicated in subdivisions *a* and *b* hereof.

4. Selections are restricted to lands returned as agricultural. The selected tracts must be connected with specific bases of not less than the quantity selected, and containing as near such quantity as practicable. Should the aggregate quantity of the bases in any list exceed that of the tracts selected the State will receive due credit upon adjustment of her grant. The character of selected tracts will be determined under the rules existing as to agricultural land entries. In all cases the selected tracts must be covered by non-mineral affidavits made by the selecting agent of the State or an agent duly appointed by the State Board of Land Commissioners for the purpose, and in case of such appointment evidence thereof should accompany the affidavits.

5. In making selections on mineral bases the acts of 1875 and 1884 must be construed together. The law restricts selections to not more than one quarter section, and the tracts selected must be "as contiguous as may be" to the bases. As to such contiguity the rule is prescribed that vacant public land as near the basis as practicable shall be selected. Selections of land in a different district from that embracing the basis will not be admitted, unless it be clearly shown that there are no public lands in the district in which the basis is situated. The circular of the General Land Office of May 19, 1886, which allowed applications to be presented for lands in a different land district from that embracing the bases, is hereby modified accordingly.

6. The date of the filing in the district land office of each application to select must be certified to by the district officers and the application

noted on the records. When an application is allowed by direction of this office, the selections must be made of record as of date of filing the application in the usual manner. Lists of selections on mineral bases will be numbered in the current series of school selections in each district.

7. A fee of one dollar each allowed registers and receivers for each final location of one hundred and sixty acres by the act of July 1, 1864 (seventh subdivision of section 2238, U. S. Revised Statutes), must be paid by the State upon admission of school selections, and the total amount of the fees received should be stated on the list in their certificate admitting the same.

Approved, May 2, 1887.

H. L. MULDROW,

Acting Secretary.

AN ACT to enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States, approved March 3, 1875 (18 Stat., 474).

* * * * *

SEC. 7. That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools.

* * * * *

SEC. 14. That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools.

SEC. 15. That all mineral lands shall be excepted from the operation and grants of this act.

AN ACT to enable the State of Colorado to take land in lieu of the sixteenth and thirty-sixth sections found to be mineral lands, and to secure to the State of Colorado the benefit of the act of July second, eighteen hundred and sixty-two, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agricultural and mechanic arts," approved April 2, 1884 (23 Stat., 10).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an

equal footing with the original States," approved March third, eighteen hundred and seventy-five, shall be construed as giving to the State of Colorado the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as may have been or shall be found to be mineral lands: *Provided*, That such selections shall be made from lands returned as agricultural, and upon which at the date of selection no valuable mineral discoveries have been made; and all such selections shall be reported to the Secretary of the Interior, who shall, if he is satisfied such lands so selected are not mineral, so certify, and thereupon the right of said State to such selected lands shall finally attach; and the Secretary of the Interior shall also ascertain whether any of such sixteenth and thirty-sixth sections are mineral lands, and shall certify their character, which certificate shall determine the matter.

SEC. 2. That it shall be the duty of the deputy surveyor, at the time of executing the survey of any township, to make a critical examination of the character of sections sixteen and thirty-six, and to embrace in his field-notes a full report of any and all mineral discoveries found to the surveyor-general, who shall report to the Secretary of the Interior whether the whole or any part of either of said sections is mineral in character.

MATTSON v. ST. PAUL, M. & M. RY. CO.

Motion for review of decision of January 13, 1887 (5 L. D., 356) denied by Acting Secretary Muldrow, May 26, 1887.

SURVEYS—SUBDIVISION OF SECTIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 2, 1887.

This office being in receipt of many letters making inquiry in regard to the proper method of subdividing sections of the public lands, the following general rules have been prepared as a reply to such inquiries. The rules for subdivision are based upon the laws governing the survey of the public lands. When cases arise which are not covered by these rules and the advice of this office in the matter is desired, the letter of inquiry should, in every instance, contain a description of the particular tract or corner with reference to township, range, and section of the public surveys, to enable the office to consult the record.

Under the provisions of the act of Congress approved February 11, 1805, the course to be pursued in the subdivision of sections is to run straight lines from the established quarter-section corners, United States

surveys, to the opposite corresponding corners, and the point of intersection of the lines so run will be the corner common to the several quarter-sections, or, in other words, the legal center of the section.

In the subdivision of fractional quarter-sections where no opposite corresponding corners have been or can be fixed, the subdivision lines should be ascertained by running from the established corners due north, south, east or west lines, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional section.

The law presupposes the section lines surveyed and marked in the field by the United States deputy surveyors to be due north and south or east and west lines, but in actual experience this is not always the case; hence, in order to carry out the spirit of the law, it will be necessary, in running the subdivisinal lines through fractional sections, to adopt mean courses where the section lines are not due lines, or to run the subdivision line parallel to the section line when there is no opposite section line.

Upon the lines closing on the north and west boundaries of a township, the quarter-section corners are established by the United States deputy surveyors at precisely forty chains to the north or west of the last interior section corners, and the excess or deficiency in the measurement is thrown on the outer tier of lots, as per act of Congress approved May 10, 1800.

In the subdivision of quarter-sections the quarter-quarter corners are to be placed at points equidistant between the sections and quarter-section corners and between the quarter corners and the common center of the section, except on the last half mile of the lines closing on the north or west boundaries of a township, where they should be placed at twenty chains, proportionate measurement, to the north or west of the quarter-section corner.

The subdivision lines of fractional quarter-sections should be run from points on the section lines intermediate between the section and quarter-section corners due north, south, east, or west, to the lake, water-course, or reservation which render such tracts fractional.

When there are double sets of section corners on township and range lines, the quarter corners for the section south of the township lines and east of the range lines are not established in the field by the United States surveyors, but in subdividing such sections said quarter corners should be so placed as to suit the *calculations of the areas of the quarter-sections adjoining the township boundaries* as expressed upon the official plat, adopting proportionate measurements where the present measurements of the north or west boundaries of the sections differ from the original measurements.

By "proportionate measurement" as used in this circular is meant a measurement having the same ratio to that recorded in the original field notes as the *length of chain* used in the new measurement has to the

length of chain used in the original survey, assuming that the original measurement was correctly made.

For example: The length of the line from the quarter-section corner on the west side of section 2, township 24 north, range 14 east, Wisconsin, to the north line of the township, by the United States surveyor's chain was reported as 45.40 chains, and by the county surveyor's measure is reported as 42.90 chains, then the distance which the quarter-quarter corner should be located north of the quarter-section corner would be determined as follows:

As 45.40 chains, the government measure of the whole distance, is to 42.90 chains, the county surveyor's measure of the same distance, so is 20.00 *chains, original measurement*, to 18.90 chains by the county surveyor's measure, showing that by proportionate measurement in this case the quarter-quarter corner would be set at 18.90 chains north of the quarter-section corner instead of at 20.00 chains north of such corner as represented on the official plat. In this manner the deficiency of measurement by the county surveyor's chain from that by the government surveyor's chain is equitably distributed.

Very respectfully,

WM. A. J. SPARKS,
Commissioner.

Approved June 2, 1887:

H. L. MULDROW,
Acting Secretary.

PRE-EMPTION—FINAL PROOF—MORTGAGE—RESIDENCE.

YOUNG v. ARNOLD.

The intention to mortgage the land, after the issuance of final certificate, for the purpose of securing the purchase price thereof, does not invalidate the final proof.

Acting Secretary Muldrow to Commissioner Sparks, June 11, 1887.

On the 9th of November, 1885, Frank Arnold procured and filed the relinquishment of R. H. Brown's timber-culture entry for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 111, R. 60, Huron district, Dakota; at the same time filing pre-emption declaratory statement for the tract described, alleging settlement November 5th.

May 23, 1886, Arnold filed notice of intention to make final proof on the 25th of May ensuing.

On said 25th of May George W. Young made homestead entry of the tract, and filed protest against Arnold's proof. After examination the local officers decided in favor of Arnold. Young appealed to your office, which decided, December 7, 1886, rejecting Arnold's proof but allowing him "to come in at any time within the lifetime of his entry and

make new proof, showing a satisfactory compliance with all the requirements of the law."

From this decision Young appeals to the Department.

Your said decision sums up the evidence with substantial correctness as follows :

The testimony shows that Arnold purchased Brown's relinquishment of and his improvements on the tract involved, viz., thirty-five acres of breaking, paying him therefor five hundred and twenty-five dollars; that he filed as alleged, and made settlement before the intervention of an adverse claim. . . . He built a good comfortable house on the tract, and established residence therein on the 24th of November, 1885; broke six acres more, put up a stable, dug a well, and has cultivated to crop the whole of the forty-one acres, and at the date of the hearing was going on with more breaking.

Nevertheless, you direct the rejection of his proof, because—

It appears that he made his proof at the earliest possible date, and with a view to raising money in some way on the tract; it further appears that all of his family did not reside with him on the tract.

The offer of final proof at any time after the expiration of the period prescribed by your regulations made in accordance with law cannot invalidate the proof; the most that can be said is that such fact, taken in connection with other facts, may serve to cast doubt on the claimant's good faith. But in this case no such other facts appear.

The intention to mortgage a claim, after receipt of final certificate, in order to raise the money wherewith to pay for the land, does not invalidate the proof. See, as bearing upon this point *Myers v. Croft* (13 Wall., 291); *Larson v. Weisbecker* (1 L. D., 422).

Prior to filing for the tract in question, claimant had rented a quarter-section of improved land, upon which he had done a large amount of plowing, and which he could not abandon until an even year from the date of renting, without losing all the work done thereon; therefore a portion of his family remained on the rented land, supervising affairs there. The facts upon this point are correctly summed up thus by the receiver—the register also signing the decision:

Arnold himself, with one or two of his children, spent more or less of the time nearly every day or night on said land, he sleeping there every night except a few since November 5, 1885, and his wife a part of the time. . . . I am not only of the opinion, but am firmly and thoroughly convinced, that the claimant has taken said land in good faith and for his own use and permanent home.

Sharing in this conviction, after a careful examination of the testimony, I am of the opinion that the proof was sufficient, and have to direct that patent issue to Arnold thereon. Your decision is modified accordingly.

MINING CLAIM—EXCLUSION OF DISCOVERY SHAFT.

CAYUGA LODGE.

The exclusion of that portion of the claim which contains the discovery shaft, renders it incumbent upon the applicant to show the existence of mineral within the remainder of the claim, prior to the allowance of entry therefor.

Acting Secretary Muldrow to Commissioner Sparks, June 11, 1887.

I have considered the appeal of Robert C. Chambers from your decision of January 20, 1886, holding for cancellation his mineral entry No. 30, made December 7, 1883, at Hailey, Idaho, said entry being called the Cayuga Lode claim, lot 66.

On August 7, 1882, Chambers first made application for patent for the Cayuga Lode. The claim was then described as having a surface measurement of 1500 feet long by 600 feet wide, containing 20.66 acres. Due notice was given by publication and other prerequisites of the law were seemingly complied with.

Within the period of publication M. F. Richardson, as claimant of the Central Lode, filed an adverse claim; and forthwith instituted proper legal proceeding in the court of the second judicial district of said Territory to determine the question of the right of possession. Said suit was prosecuted to final judgment on November 27, 1883, when plaintiff was declared to be the owner of 18.02 acres of the surface ground within the limits of the Cayuga claim as described by the defendant. Thereupon, Chambers made the entry in question, for the residue of the Cayuga claim, comprising 2.64 acres—about 170 feet—in the south-easterly portion of said claim.

On October 5, 1885, in a letter to the register and receiver, you called attention to the fact that "There is no evidence in the record showing that the alleged Cayuga vein or lode extends in its onward course, or strike, through or into the entered ground, nor is it shown that any vein, lode, or mineral has been discovered therein."

Inasmuch as no adverse claim had been asserted to said tract, you allowed the claimant sixty days in which to supply the required proof; and also to furnish an additional certificate from the surveyor general's office as to improvements, as well as an abstract of title up to the date of the filing of the present application.

On December 26, 1885, certain affidavits were filed, which it was claimed met the requirements of your office; but, on January 20, 1886, you decided otherwise and held said mineral entry for cancellation. From that action an appeal was taken.

Section 2320 of the Revised Statutes says, "no location of a mining claim shall be made until the discovery of the vein or lode *within the limits of the claim located.*" This is a prerequisite to the location, and of course entry, of any mining claim. Without compliance with this

essential requirement of the law no location will be recognized, no entry allowed.

Has this requirement been complied with in this case?

The entry made by Chambers is of 2.64 acres in the southeastern end of the Cayuga claim as originally made by him. That claim was fifteen hundred feet long and six hundred wide. The mineral discovery was said to have been made in the discovery shaft, which was located about the middle of the original claim.

There is no pretense that there has been any other discovery of mineral than the one stated when the original claim was filed, and which point of discovery was decided by the court to be within the location of Central claim of M. F. Richardson.

The departmental circular of December 4, 1884 (3 L. D., 540), very clearly states the law on this point. It says:

The rights granted to locators under section 2322 of the Revised Statutes are restricted to such locations on veins, lodes, or lodges, as may be "situated on the *public domain*." In applications for lode claims where the survey conflicts with a prior valid lode claim, and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode, the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claim terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded land, and passes within it.

Not having any right to such lode within the excluded ground, he can claim no right by virtue of the discovery of the same therein.

But it is asserted in behalf of appellant that the so-called Cayuga, but more properly the Central, lode does extend from the point of discovery, within the lines of the latter claim into the 2.64 acre tract entered by Chambers.

The testimony on which this assertion is based is contained in the affidavit, filed December 26, 1885, of W. H. Watt, agent and attorney in fact of the appellant. In that affidavit Watt says:

A vein or lode bearing lead and silver bearing rock in place was discovered at the time of making the original location of the Cayuga lode claim at the point of discovery, as shown in the survey for patent; that said vein has only been developed and opened by shafts and cuts near the point of discovery; that the strike of said lode *is believed* to be, from the developments made, parallel to the other lodes in the vicinity, that is, in a general northwesterly and southeasterly direction; that said lode is not open at any other point within the limits of the Central lode claim or the Cayuga lode claim; that the ground entered in mineral entry 30, embracing an area of 2.64 acres *is believed* to embrace said vein or lode on its onward course southeasterly from the point of discovery; that this is confirmed by a vein developed in the Caledonia Fraction mining claim, which forms the southeasterly extension of said Cayuga lode claim.

This is all the testimony in the case on this point; and it utterly fails to show the discovery of mineral in the entered premises, or that the

lode or vein discovered near the shaft, within the lines of the Central claim, extends on its strike through or into the entered land.

Counsel for appellant cites several decisions, which he claims sustain his contention that this evidence is sufficient to show that the Central vein does extend into the entered premises. It needs but an examination of the cases cited to satisfy the judicial mind that so far as they are applicable to the present case they are authorities adverse to the contention for appellant.

Indeed, were it otherwise there would be no restraint upon the entry of presumed mineral land for speculative purposes, to the exclusion of that class of citizens for whose benefit the mining laws were so carefully and beneficently framed.

Entertaining these views, it is not necessary to discuss other matters in the case. I affirm your judgment, and direct the cancellation of said entry.

PRIVATE CLAIM—SELECTION AND LOCATION.

BACA FLOAT, NO. THREE.

There is no power or authority in the Department, on failure of the claimants to make selection and location within the period designated by the statute, to remove the limitation, and authorize a selection and location thereafter.

The Department has no authority to cancel a selection and location, made within the period prescribed, of non-mineral land, or land not known to be mineral.

The selection and location of lands known to be mineral might be properly vacated; but the right to select other land in lieu thereof would be barred, unless made within the statutory period.

**Secretary Lamar to Commissioner Sparks, June 15, 1887.*

On August 12, last I heard Mr. John C. Robinson, through his counsel, protesting against your views relative to the right to re-locate Baca Float No. 3, and asking that your views and opinions be annulled, and that the order of Acting Commissioner Harrison of March 12, 1885, be declared legal and final.

The action complained of appeared to be a mere expression of opinion, and as no official action had been taken by you relative to the right to re-locate the claim under the decision of March 12, 1885, there was nothing before me to act upon and hence the application was denied.

This matter is again brought to my attention by the communication of Mr. W. G. Rifenburg, submitting the question whether said land can be re-located.

By the 6th section of the act of Congress of June 21, 1860, (12 Stat., 72) it is provided:

That it shall be lawful for the heirs of Louis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, (Vegas,) to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be

located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the Lands so selected by said heirs of Baca when thereunto required by them; *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

By reference to the act it will be seen that selections were to be made in the Territory of New Mexico in square bodies, not exceeding five in number. In accordance therewith, five selections were made—known as Baca Claims, numbers 1, 2, 3, 4 and 5, respectively. It was ascertained that the quantity of land claimed by the town of Las Vegas was 496,446.96 acres, and therefore each location embraced 99,289.39 acres.

The tract designated as claim No. 3 was selected and located by John S. Watts, attorney for the Baca heirs, June 17, 1863, and was approved by the surveyor general of New Mexico on same day, but was not surveyed because claimants failed to make the necessary deposit to pay for expense of survey. On April 30, 1866, claimants filed an amended application for selection and location of claim No. 3, and on May 21, 1866, your office issued instructions for survey thereof as amended. By decision of your office of September 27, 1877, upon the application of J. S. Watts, attorney for claimants, to re-locate this claim, the application was rejected, upon the ground that your office could not authorize a re-location and selection of said claim after the expiration of the time limited by Congress.

February 13, 1885, John C. Robinson filed in your office his application as owner to re-locate Baca claim No. 3, alleging that the present selection of this claim is upon lands mineral in character. Upon this application Acting Commissioner Harrison, by decision of March 12, 1885, held: "The present location of the claim is therefore rejected, for the reason that the lands embraced are mineral in character, and not subject to selection and location under the act, and a re-selection and location is hereby allowed."

It will be observed that the present location of this claim was not rejected upon any application or claim of the government, but in accordance with the application and request of the grant claimants and upon their allegation of the fact that the land is mineral.

A similar question came before your office on the application of William Gilpin for patent to Baca claim No. 4. In that case it was claimed by the government that the land was mineral, and that the surveyor general approved the plat of survey, subject to the conditions and provisions of the act of June 21, 1860. Commissioner Williamson, however, held that, "The surveyor general did not undertake and had no power to impose conditions not in the act," and that "The question as to the mineral or non-mineral character of this land has been passed upon by competent authority, the title has passed from the government and vested in private individuals, this office has no authority to re-open

the question, the land can no longer be regarded as part of the public domain."

In the case above referred to, it was urged by the government that the mineral character of the land was sufficient to invalidate the selection and location. In the application to re-locate claim No. 3, the claimant alleges the mineral character of the land as a reason why he should be allowed to re-locate the claim, no objection to the character of the land being made by the government. The ruling of Commissioner Williamson upon the application to re-locate claim No. 4 is applicable to this case and should have controlled.

The act of June 21, 1860, authorizing claimant to select and locate vacant land not mineral in the Territory of New Mexico, in lieu of land claimed by the town of Las Vegas, provided that said right "shall continue in force during three years from the passage of this act *and no longer.*"

Here is an express limitation of the right to make selection and location. If claimant failed to make selection and location (and by location is meant the designation by approximate boundaries of a specific tract) on or prior to June 21, 1863, there is no power or authority in the Department to remove the bar and to authorize a selection and location thereafter.

So, on the other hand, if selection and location of this claim has been made prior to June 21, 1863, of lands not mineral or not known to be mineral, agreeable to the provisions of said act, there is no power or authority in the Department to cancel such selection and allow a re-location of said claim. It is true that if claimants made selection and location of lands known to be mineral, such selection and location could be vacated, and the right to select other land in lieu thereof would be barred, unless made within the time limited by the act.

For the reason above stated the action of Commissioner Harrison of March 12, 1885, was without authority and therefore void.

It is conceded that a selection was made, the location designated and approved by the surveyor general June 17, 1863, agreeable to the provisions of the act. It appears that this selection was amended upon application made therefor April 30, 1866, so as to correct what was alleged to be a mistake in defining the location, and that instruction for the survey of the location as amended was issued by your office May 21, 1866.

The claimant must be held to this selection and location, and cannot be allowed to re-locate other land in lieu of it.

If, however, the government has disposed of any part of the lands embraced in said location, by reason of the action of your office of March 12, 1885, claimant perhaps might in that event upon a proper application made be allowed to select and locate other land in lieu of such lands as may have been so disposed of by the government; but as no such facts appear, and no application has been made to your office for that purpose, I decline to pass upon that question.

ENTRY WITHIN FORMER OMAHA INDIAN RESERVATION.

HERMAN FREESE.

The entryman is entitled to one year from date of entry within which to make his first payment.

Secretary Lamar to Commissioner Sparks, June 24, 1887.

I am in receipt of your letter of April 2, 1887, transmitting the papers in the case of the appeal of Herman Freese from your office decision of January 6, 1887, affirming the action of the local officers at Neligh, Nebraska, in rejecting proof and payment offered by said Freese on his declaratory statement No. 542, made September 14, 1885, for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 19, T. 25 N., R. 6 E., within the limits of the former Omaha Indian reservation.

Your decision is based upon the ground that—

The act of August 7, 1882, provides that in case of default of payment the person thus defaulting shall forfeit absolutely his right to the tract. The act of August 2, 1886, provides that no forfeiture should be deemed to have accrued solely because of default in payment of principal or interest becoming due April 30, 1886, if the interest due upon said date be paid within sixty days from August 2, 1886. In the cases under consideration, payment of interest was due not later than sixty days from August 2, 1886.

The above cited act (of August 2, 1886, 24 Stat., 214) applies, by its own terms, only to cases where parties were in default April 30, 1886. In this case the entryman, having made entry September 14, 1885, and having one year within which to make his first payment, could not possibly be in default April 30, 1886; consequently the provision in the act of August 2, 1886, above cited, does not apply. Forfeiture could not be declared until sixty days after the expiration of a year from date of entry (September 14, 1885, *supra*)—not of settlement, as stated by the local officers in their letter of March 14, 1877, to claimant's counsel. Proof and payment having been offered within the prescribed period from date of entry, ought to have been accepted. (See 22 Stat., 341.)

Your decision is reversed.

DESERT LAND-ENTRY—FINAL PROOF.

CIRCULAR.

Commissioner Sparks, to registers and receivers June 27, 1887.

The first section of the act of March 3, 1877 (19 Stat., 377) entitled "An act to provide for the sale of desert lands in certain States and Territories", provides for the reclamation of such lands by "conducting water upon the same." The second section provides "that all lands ex-

clusive of timber lands and mineral lands which will not, without artificial irrigation produce some agricultural crop, shall be deemed desert lands within the meaning of this act," and the third section provides that "the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

It is therefore prescribed as follows:

1st. Lands bordering upon streams, lakes, or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water or living spring, are not subject to entry under the desert land law until the clearest proof of their desert character is furnished.

2nd. Land which produces native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons is not desert land.

3d. Lands which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, are not desert.

4th. Lands containing sufficient moisture to produce a natural growth of trees, are not to be classed as desert lands.

1. The amount of land which may be entered by any one person under the desert land act cannot exceed one section, or six hundred and forty acres, which must be in compact form, and no person can make more than one entry.

2. Desert land entries are not assignable, and the transfer of such entries whether by deed, contract or agreement, vitiates the entry. An entry made in the interest or for the benefit of any other person, firm, or corporation or with intent that the title shall be conveyed to any other person, firm or corporation, is illegal.

3. The price at which lands may be entered under the desert land act is the same as under the pre-emption law, viz: single minimum lands at \$1.25 per acre, and double minimum lands at \$2.50 per acre. (Section 2357 U. S. Revised Statutes.)

4. A party desiring to avail himself of the privileges of the desert-land act must file with the register and receiver of the proper district land office a declaration under oath, setting forth that the applicant is a citizen of the United States, or that he has declared his intention to become such. In the latter case a duly certified copy of his declaration of intention to become a citizen must be presented and filed. It must also be set up that the applicant has not previously exercised the right of entry under the provisions of this act, and that he intends to reclaim the tract of land applied for by conducting water thereon within three years from the date of his declaration. The declaration must also contain a description of the land applied for, by legal sub-divisions if surveyed, or if unsurveyed as nearly as possible without a survey, by giving with as much clearness and precision as possible the locality of

the tract with reference to the already established lines of survey, or to known and conspicuous landmarks, so as to admit of its being readily identified when the lines of survey come to be extended.

5. Your attention is called to the terms of this declaration as provided by existing regulations (form 4—274), which are such as require a personal knowledge by the entry men of lands intended to be entered. The required affidavit cannot be made by an agent nor upon information and belief and you will hereafter reject all applications in which it does not appear that the entryman made the averments contained in the sworn declaration upon his own knowledge derived from a personal examination of the lands. The blank in the declaration, to wit: "that I became acquainted with said land by ———", must be filled in with a full statement of the facts of his acquaintance with the land and how he knows its character as alleged. Said declaration must be corroborated by the affidavits of two reputable witnesses who are acquainted with the land and with the applicant, and who must clearly state their acquaintance with the premises, and the facts as to the condition and situation of the land upon which they base their judgment. (Form 4—074.)

6. Applicants and witnesses must in all cases state their place of actual residence, their business or occupation, and their post-office address. It is not sufficient to name the county and State or Territory where a party lives but the town or city must be named, and if residence is in a city the street and number must be given.

7. The declaration and corroborating affidavits may be made before either the register or receiver of the land district in which the lands are situated, or before the judge or clerk of a court of record of the county in which the lands are situated, and if the lands are in an unorganized county then the affidavit may be made in an adjacent county. The depositions of applicant and witnesses in making final proof must be taken in the same manner; and the authority of any practice or regulation permitting original or final desert land affidavits to be executed before any other officers than those named above, is hereby revoked. The affidavits of applicant and witnesses must in every instance, either of original application or final proof, be made at the same time and place and before the same officer.

8. When proof of the character of the land has been made as above required to the satisfaction of the district officers, the applicant will pay the receiver the sum of twenty-five cents per acre where the land is single minimum, and fifty cents per acre where the land is double minimum. The register will receive and file the declaration, and the register and receiver will jointly issue, in duplicate, a certificate (Form 4—199) acknowledging the receipt of the twenty-five or fifty cents per acre as the case may be, and the filing of the declaration. One of these duplicates will be delivered to the applicant; the other will be retained by the register and receiver with the declaration and proof. They will bear a number according to the order in which the certificate was is-

sued. The register will keep a record of the certificates issued, showing the number, date, amount paid, name of applicant, and description of the land applied for in each case, and, in addition, he will note the same upon his plats and records as in cases of ordinary entry. At the end of each month he will with his regular returns, forward to the General Land Office an abstract of the declarations filed and certificates issued under this act during the month, accompanying the same with the declarations and proofs filed and the retained copy of certificate in each case. The receiver will also account for the money received under this act in the usual form.

9. Surveys of desert land claims cannot be made in advance of the regular progress of the public surveys. After a township has been surveyed the claim must be adjusted to the lines of the survey.

10. Persons making desert land entries must acquire a clear right to the use of sufficient water for the purpose of irrigating the whole of the land, and of keeping it permanently irrigated. A person who makes a desert land entry before he has secured a water right does so at his own risk, and as one entry exhausts his right of entry, such right cannot be restored or again exercised because of failure to obtain water to irrigate the land selected by him.

11. The source and volume of the water supply, how acquired and how maintained, the carrying capacity of the ditches, and the number and length of all ditches on each legal subdivision of the land, must be specifically shown. Applicant and witnesses must each state in full what has been done in the matter of reclamation and improvement, and by whom, and must each answer fully and of their own personal knowledge, the questions propounded in the final proof depositions. They must state specifically whether they at any time saw the land effectually irrigated, for without knowledge thus derived the fact of reclamation remains a matter of conjecture. (Case of Charles H. Schick, 5 L. D., 151.)

12. The whole tract and each legal subdivision for which proof is offered must be actually irrigated. If there are some high points or uneven surfaces which are practically not susceptible of irrigation, the nature, extent and area of such spots must be fully stated. In this connection the right to the water used, the quantity of it, the manner of its distribution and the permanence of the supply are all to be taken into consideration. (Case of Geo. Ramsey, 5 L. D. 120.)

13. Before final proof shall hereafter be submitted by any person claiming to enter lands under the desert land act, such person will be required to file a notice of intention to make such proof which shall be published in the same manner as required in homestead and pre-emption cases.

14. Contests may be instituted against desert land entries for illegality or fraud in the inception of the entry, or for failure to comply with the law after entry, or for any sufficient cause affecting the legality or

validity of the claim. Contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry, in the same manner as in homestead and pre-emption cases, and the register will give the same notice, and be entitled to the same fee for notice, as in other cases.

15. When relinquishments of desert land entries are filed in the local land office the entries will be canceled by the register and receiver in the same manner as in homestead, pre-emption and timber-culture cases, under the first section of the act of May 14, 1880. (21 Stat., 140.)

16. Nothing herein will be construed to have a retroactive effect in cases where the official regulations of this Department in force at the date of entry were complied with.

Approved,

L. Q. C. LAMAR,
Secretary.

SALE OF INDIAN LANDS—STATE CLAIM FOR FIVE PER CENT.

THE STATE OF KANSAS *v.* THE UNITED STATES.

The provisions of section 2, act of March 3, 1857, directing the allowance, to each ^{State} of the States, of five per cent of the proceeds resulting from the sale of land theretofore included in Indian reservations, are not applicable to States subsequently admitted to the Union.

The declaration, common to the acts admitting the several States to the Union, that "all laws not locally inapplicable shall have the same force and effect within that State as in the other States of the Union", is not intended to enlarge a specific grant, or authorize the payment of money out of the Treasury not otherwise authorized.

It is the duty of the Secretary of the Interior to inquire into the legality of claims presented, regardless of apparent legislative or executive construction, and determine whether they are valid claims in law against the United States.

Appropriation of money by special acts of Congress for the payment of particular claims does not warrant the conclusion that the government recognizes its legal liability for the amount of such claims, or for the amount of other claims of like character.

The provision, in the act admitting Kansas to the Union, for the payment of five per cent of the net proceeds resulting from the sale of lands by the government was limited by its terms to the sale of *public* lands, and affords no basis for a claim where sales are made of Indian lands by the government acting as trustee.

Secretary Lamar to Commissioner Sparks, June 28, 1887.

Your letter of September 14, 1886, in relation to a claim made by the State of Kansas to five per cent. of the proceeds of the sales of certain Indian lands, has been received and duly considered.

The amount claimed is \$43,790.32, being five per cent on the amount of sales, less expenses, of certain lands, made between July 1, 1884, and June 3, 1885; and which lands were heretofore reserved for the Cherokee, Kansas, Miami and Osage tribes of Indians.

Entertaining doubts as to the validity of said claim, you declined to certify the same to the First Comptroller of the Treasury, and transmit it to this Department for instructions.

By the third section of the act of January 29, 1861 (12 Stat., 127), admitting Kansas into the Union, it is provided that—

The following propositions are hereby offered to said people of Kansas for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the State of Kansas, to wit:

First. That sections numbered sixteen and thirty-six in every township of public lands in said State shall be granted to said State for the use of the public schools

* * * * *

Fifth. That five per centum of the net proceeds of sales of all public lands, lying within said State, which shall be sold by Congress, after the admission of said State into the Union, after deducting all expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, and for other purposes, as the Legislature may direct.

The condition of said grant was that said State should provide by irrevocable ordinance that it would “never interfere with the primary disposal of the soil within the same by the United States,” and never tax the lands or property of the government. The condition was accepted, and proper action taken in relation thereto.

You state that at the time of the admission of Kansas there were “large bodies of lands within the boundaries of the State, although not within its political jurisdiction, that belonged to the Indians by original title and treaty stipulations that after the admission of the State were ceded by the Indians to the United States for the purpose of being sold, the proceeds to constitute a fund to belong to the Indians”; and the question presented is, whether the State of Kansas is entitled to five per cent of the sales of said lands?

The case has been argued fully, orally and on brief, by counsel for the State of Kansas, and the questions involved not being free from difficulty, have received most careful examination and consideration.

It is insisted that similar claims, arising under like circumstances, have been recognized and paid by the United States since 1819; and that claims identical in character and involving the identical questions now presented, have heretofore been decided favorably to the State by the Commissioner of the General Land Office, the Secretary of the Interior, the Comptroller and Secretary of the Treasury, and by Congress; and that said claims have been paid to the State of Kansas for every year since her admission into the Union in 1861 to the date of your refusal to audit said claim in 1886—a period of twenty-five years.

Such a state of facts, if true, should ordinarily be entitled to due weight by the Executive, inasmuch as precedents in departmental ruling should be respected and not lightly or wantonly departed from. While said statement is true in a general way, an examination of the legislative and departmental action in the premises shows that it was

taken under circumstances and conditions not entirely similar to those under which the present application is made, as will be seen by the following review.

By the sixth section of the act of March 2, 1819 (3 Stat. 491), admitting Alabama into the Union, it was provided:

That five per cent of the net proceeds of the lands lying within said territory, and which shall be sold by Congress, from and after September 1, 1819, after deducting all expenses incident to the same, shall be reserved for making public roads, etc.

At the time of the passage of said act and long afterwards, there were large bodies of lands in said State reserved for or occupied by the Indians; and on March 2, 1855 (10 Stat., 630), Congress passed another act, whereby the Commissioner of the General Land Office was required to state an account between the United States and Alabama, for the purpose of ascertaining what sums were due the State under the act of admission; and he was "required to include in said account the several reservations," under various treaties with the Indians, "and allow and pay to said State five per centum thereon, as in the case of other sales."

By the act of March 3, 1857 (11 Stat., 200), the Commissioner was directed to state a similar account with the State of Mississippi, estimating lands in the Indian reservations at \$1.25 per acre. By the second section of said act, it was provided:

That the said Commissioner shall also state an account between the United States and each of the other states of the Union upon the same principles, and shall allow and pay to each state such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre.

Under these acts of Congress the accounts of all of the States in the Union in 1857 were adjusted, and the ascertained amounts paid over to them; except California, in relation to which no grant of a percentage on the sales of lands was made.

So far as this legislative construction is of any weight, it would seem to militate rather against the present claim of Kansas, inasmuch as it shows that while the act of Congress admitting Alabama reserved to her "five per cent of the net proceeds of *the lands* lying within said territory, and which shall be sold by Congress from and after September 1, 1819," yet in order to give to that State any percentage on account of Indian lands, it was necessary that a special act of Congress should be passed, requiring such allowance to be made. This, it is not to be presumed, would have been done if Congress had believed the State could have obtained the allowance under the act of admission. The same may be said with regard to Mississippi, whose act of admission is in the same terms. Indeed, the argument would be much stronger in favor of the right of Mississippi and Alabama under their compact, because the language therein used is "five per cent of the net proceeds of *the lands*, lying within said territory," etc., whilst the Kansas act

says, "five per centum of the net proceeds of sales of all *public* lands," etc.

I do not think that the action of Congress in relation to payments specially authorized by it under the act of 1857 can be successfully invoked as a legislative construction in favor of the present claim of Kansas, but might be invoked properly if that State were now asking Congress for similar special legislation.

The States admitted to the Union subsequent to the passage of the act of March 3, 1857, *supra*, all have, either in their enabling act or the act of admission, the same provision, and in general the same words, as to the five per cent grant, as is found in the act admitting Kansas. It is also declared by Congress in relation to each of said States, in common with all of the States, that "all laws not locally inapplicable shall have the same force and effect within that State as in the other States of the Union." Construing this last provision to extend the act of March 3, 1857, to the States admitted after its enactment, the accounts of the new States were stated by the General Land Office and paid by the Treasury, in accordance with its supposed requirements.

That this construction is clearly erroneous, I have no doubt. I can not bring myself to believe that by the enactment of this clause, common to all the States, it was ever intended to enlarge a specific grant, or to authorize the payment of money out of the Treasury, not otherwise authorized. But it is not necessary to discuss this particular question further, for in my opinion it has been determined by the decision of the supreme court in the analogous case of *Rice v. Sioux City and St. Paul R. R. Co.*, (110 U. S., 695), which I think ought to be conclusive on this point.

By act of September 28, 1850 (9 Stat., 519), a grant of swamp lands as therein described was made to the State of Arkansas. By the fourth section of said act it declared that its provisions "be extended to and their benefits conferred upon each of the other states of the Union, in which such swamp and overflowed lands, known or designated as aforesaid, may be situated."

On May 11, 1858, Minnesota was admitted into the Union as a State; and the act of admission contained the usual provision that "all laws of the United States which are not locally inapplicable shall have the same force and effect within that State as in other States of the Union." Under this provision it was claimed that the swamp land grant was extended to Minnesota on its admission into the Union, there being lands of the character described in the act within her borders. But the supreme court, in the case cited, held otherwise, saying that, "as the act of 1850 (swamp grant) related only to the States in existence when it was passed, it was locally inapplicable to Minnesota," until afterwards special legislation extended it to that State. This decision was made on March 3, 1884, but prior thereto, in 1874, a similar claim, arising under similar laws and conditions to that of Kansas, was presented to the Commis-

sioner of the General Land Office in behalf of the State of Nebraska, and was rejected. On appeal to this Department, my predecessor, Secretary Delano, reversed the action of the Commissioner and directed the certification of the claim, and its transmission to the Comptroller of the Treasury. The decision of the Secretary was based upon the ground that under the general provision in the Nebraska law, the act of 1857, *supra*, was made applicable to that State, and it was entitled to have its account stated as therein directed. When the Nebraska account reached the Treasury, the then Comptroller, Mr. R. W. Tayler, on November 4, 1875, rejected it, holding in an able opinion that the act of 1857 was only applicable to the States in the Union at the time of its enactment, and not to those subsequently admitted, as was Nebraska; also holding that State could not get the five per cent under its compact, for the grant there was, like that of Kansas, of the *net* proceeds of the sale of *public* lands; that the lands in question being Indian lands were not "*public*" within the meaning of the grant; that the so-called sale being made for the benefit of the Indians and by the government as their trustee, there were in its hands no proceeds, net or otherwise, out of which Nebraska could be paid five per cent or any other sum.

Things were in this condition, when, at the October term 1877, the supreme court decided the case of *Beecher v. Wetherby*, (95 U. S., 517,) wherein it was supposed to have been ruled that lands in the category of the Indian lands in Kansas were "*public*" lands and passed by a grant as such. Thereupon, on April 19, 1877, the Commissioner of the General Land Office, on application of the State of Kansas, prepared and forwarded to the First Comptroller of the Treasury an account showing the amount of Indian lands sold in Kansas since its admission into the Union, and its claim of five per cent thereon, and the same was allowed May 17, 1880 (Public Domain, 722) by the then Comptroller, Mr. A. G. Porter, for the sum of \$190,268.27. But as more than two fiscal years had elapsed since the claim accrued, it was transmitted to Congress, which made an appropriation for its payment. Since this time the claims of Kansas, Nebraska and the other States have been made out each year, forwarded to and paid by the Treasury, until your action in the matter now under consideration.

The foregoing constitute the precedents relied upon to show that similar claims have been paid to all the States up to the present time; and that the question of the validity thereof should not now be inquired into, as it has been determined by this and the Treasury Department and by legislative action.

It will be seen from the foregoing that as to the States in the Union prior to the act of 1857, the payment of the five per cent on the value of Indian lands was made by virtue of special legislation, not applicable, under the ruling of the supreme court, in an analogous case, to the States subsequently admitted; that as to the new States, the action of

the Treasury officers has not been uniform; Comptroller Tayler denying a like claim by Nebraska in 1875, whilst Comptroller Porter allowed the claim of Kansas in 1880. Thus, the decisions of that Department can not be quoted as bringing the present claim within the principles of *stare decisis*. It is true the claim of Kansas when allowed was transmitted to Congress and appropriation made for the payment thereof. But I can not accept such action as a legislative construction of the law, or as in any way relieving this Department from its duty to examine the present claim, and to decline to state an account thereof, if, in the opinion of its officers, there is no law to authorize its payment.

The case of *United States v. McDougall's, administrator*, (121 U. S., 89), is in point, and grew out of claims pending before this Department on contracts made by certain Indian commissioners to supply some of the tribes with beef cattle. The cattle were duly supplied and drafts given to the different contractors. Some of the drafts were paid and some were not. Fremont went to Congress and got an appropriation to pay his claim "for beef delivered to Commissioner Barbour, for the use of the Indians in California." Helmsley and McDougall went to the Court of Claims, who rejected their claims because based upon a contract made without authority. Congress, however, made an appropriation to pay Helmsley's claim. Norris also sued and his claim was rejected. But Congress passed an act directing the Court of Claims to examine and *allow* the same on the basis of the actual supplies furnished, and Norris obtained judgment for \$69,900. Subsequently, Fremont sued on another claim and the Court of Claims awarded him judgment, on the ground that the foregoing acts of Congress constituted a clear and distinct legislative recognition of the obligation of the United States to pay the fair value of the subsistence furnished. This decision was followed in two other cases. In one of which, that of *Belt*, the court, reviewing the circumstances connected with this class of claims, held that the United States were in law liable under the agreement for furnishing the supplies to the Indians. From these decisions no appeals were taken by the government. McDougall's administrator, subsequently, also brought suit and obtained judgment in the Court of Claims, all of said claims growing out of the same transaction.

In McDougall's case, though not differing from the others, an appeal was taken by the government to the supreme court, and that tribunal held that the contract under which the claim arose fixed no liability upon the government, because made without proper authority. In relation to the question of legislative construction as shown by the previous acts making payment for like claims the court said:

That Congress by special acts made provision for the payment of particular claims of the same class furnishes no ground whatever for the assumption that the government recognized its legal liability for the amount of such claims, much less for the amount of all other claims of a like character. Such legislation may well furnish the basis for an

appeal to the legislative department of the government to place all claimants of the same class upon an equality. . . .

But the discretion which Congress has in such matters would be very seriously trammelled, if the doctrine should be established, that it can not appropriate money to pay particular claims, except at the risk of thereby recognizing the legal liability of the United States for the amount of other claims of the same general class. The same considerations apply to the suggestion that the liability of the United States to McDougall's administrator, as upon contract, may arise from failure or refusal of their law officers to prosecute appeals from judgments against the government in suits brought by other parties holding similar claims.

The question to be determined is, not whether the representatives of the government have heretofore been guilty of neglect in not prosecuting such appeals, but whether, in the case in hand, the plaintiff has a valid claim in law against the United States.

The law as here laid down by the supreme court seems to fix the measure of my duty in the premises; and to require that I should examine into the legality of the claim presented, regardless of the supposed legislative or executive construction, and determine whether it is "a valid claim in law against the United States."

Apart from any other considerations, it is insisted that the case of *Beecher v. Wetherby*, *supra*, determines the question in favor of the State.

That case arose on a construction of the clause in the compact with Wisconsin, on her admission to the Union, which provided, "that section numbered sixteen in every township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools." The State was admitted in May, 1848, but prior to that time the Indians roamed over much of the territory of which it was formed. In 1825 the United States undertook, by treaties, to settle the boundaries of lands claimed by the different tribes, and the particular section in question was within the boundaries of the land recognized as belonging to the Menomonee Indians. By further treaty the boundaries of the Menomonee country were again fixed. Portions of their land were ceded; one tract was set apart for them as the "farm" country, and for "homes," without conditions looking to the extinguishment of title or right of occupancy, whilst the other tract was to remain to them "for a hunting ground until the President of the United States" should "deem it expedient to extinguish their title," when they promised to "surrender it immediately upon being notified of the desire of the government to possess it." The tract in controversy was within this "hunting ground," and was afterwards ceded to the Stockbridge and Munsee tribes.

In October, 1852, the township embracing said section was surveyed; and in 1854, subdivided into sections. By act of Congress of February 6, 1871, the lands theretofore occupied by the Stockbridge and Munsee tribes were authorized to be sold, and subsequently were sold. The

plaintiff claimed title to section sixteen under patent from the United States, bearing date October 10, 1872, and the defendant claimed title under patent from the State of December 15, 1865.

The court held that the compact operated to transfer to the State the title to the sixteenth sections as soon as they could be identified by surveys; that said sections were appropriated to the State, withdrawn from any other disposition, set apart from the public domain, and no subsequent law authorizing a sale of it can be construed to embrace them. "All that afterwards remained for the United States to do with respect to them, and all that could be legally done, was to identify the sections by appropriate surveys." In continuation, the court says that in relation to lands in the occupancy of the Indians there can be no doubt as to the power of Congress to pass the fee by grant, and it has no doubt in the case under consideration of its intention so to do. The fee simple title having thus passed to the State, subject only to the Indian right of occupancy; that right having been extinguished in a short time after the admission of the State; and the sections having been identified by surveys in 1854, it is evident the title of the State became complete in the section upon its being thus identified and the subsequent attempt of Congress to sell it in 1871 passed no title.

I do not see that the case of Beecher and Wetherby can properly affect the claim of Kansas now under consideration. Under the ruling in that case, and by virtue of her compact, unquestionably she would be entitled to the sixteenth and thirty-sixth sections of the lands in occupancy of the Indians, when the occupancy ceases and said lands are identified by survey; or if said sections have been otherwise properly disposed of, to other lands in lieu thereof. And the fact that the grant of the five per cent claimed is made by the same act, as thus passes the conditional grant of the school sections to her, does not, that I can see, add strength to the claim. The one is a grant of the fee simple title to land, and the other a grant of the profits, so to speak, out of certain lands.

Under the grant, when the fee simple title and the right of occupancy become united in the United States, its whole title and right of possession passes to the State by virtue of the previous grant thereto. This seems plain enough. So, under the fifth clause of the compact, I can understand when the United States receives any net proceeds from the sale of public lands in Kansas, that State is entitled to be paid five per cent thereon. But I cannot see how it is possible for the United States to make such payment until it has made a sale out of the proceeds of which it has the authority of law to make such payment.

That the sale in this case is such a sale as was contemplated by the Kansas compact I do not believe. And if I did believe it, the language of the supreme court, in what are known as the Five Per Cent cases. (110 U. S., 471), would make me doubt the correctness of that belief. In those cases petitions were filed, in that court, by each of the States

of Iowa and Illinois, praying for a writ of mandamus against the Commissioner of the General Land Office to compel him to state an account between the United States and the State, ascertaining the sum of money due the latter under a similar provision as here, allowing "five per cent of the net proceeds" of lands lying in the State and "sold by Congress," and requiring him to include in said account five per cent of the value, computed at one dollar and twenty-five cents per acre, of lands taken up in said State under United States military bounty land warrants.

The supreme court refused to recognize the validity of the claim, on the ground that there had been no sale of such lands by the government within the meaning of the statutes relied upon, which are almost identical in language with that of the Kansas compact.

In the opinion of the court it is said :

When each of these acts speaks of lands 'sold by Congress' 'five per cent of the net proceeds' of which shall be reserved, and be 'disbursed' or 'appropriated' for the benefit of the State in which the land lies, it evidently has in view sales in the ordinary sense, from which the United States receive proceeds, in the shape of money payable into the treasury, out of which the five per cent may be reserved and paid to the State; and does not intend to include lands promised and granted by the United States as a reward for military service, for which nothing is received into the Treasury. The question depends upon the terms in which the compact between the United States and each State is expressed, and not upon any supposed equity, extending those terms to cases not fairly embraced within their meaning.

It seems to me that the reasoning of the court covers the case under consideration. That tribunal, construing compacts similar in language, holds that the only sales contemplated thereby are such as would give the United States money "*out of which the five per cent may be reserved and paid to the State.*" Is that the case in regard to the lands in question? They are ceded to the government to be sold; and, after deducting expenses of survey and sale, the proceeds are to be deposited in the treasury for the benefit of the Indians. The United States would violate its trust, if it were to touch one dollar of said funds, save for the purpose to which they are dedicated; for it is evident that neither the government, nor the Indians contemplated, at the time of the cession, that the proceeds of their lands were to be reduced by the donation of five per cent thereof to Kansas, of which State the latter were entirely independent, owing to it no political or other allegiance.

The United States having no power to reserve from said funds and pay to the State five per cent, in the view that there was no such sale of the lands as was contemplated by the act of admission, it follows that the present claim of the State should not be certified to the Treasury officials.

In addition to what has been said, it may be added that as to the Osage lands, the percentage on the sale of which constitutes the greater part of the present claim, their status was judicially determined by the

supreme court in the case of the L., L. & G. R. R. Co. *v.* United States (92 U. S., 733.)

There a grant was made by the United States to the State of Kansas of land for the purpose of aiding in the construction of a railroad. After the cession of the Osage lands to the United States, the railroad was definitely located through them, and no patents being required, the odd numbered sections within the granted limits were certified to the State for the use of the said road. Subsequently, suit was brought by the United States against said company to recover the title to said lands, and the supreme court held, that the status of the Osage lands was such that they did not pass by a grant which only took effect on public lands. The legal status of these lands having been thus determined by the highest court to be such as would not pass under a grant of public lands, I would be assuming an undue responsibility were I to decide that the same lands are public lands, for the purpose of extending by implication the five per cent grant in the present case. This I decline to do.

In arriving at the conclusion before stated, I am relieved to know that, if the agents of the State of Kansas are not satisfied of its correctness, they can follow the example of the agents of the States of Iowa and Illinois in the Five Per Cent cases, and apply for a mandamus. By this means the questions involved will, by an almost summary method, be brought before the supreme court of the United States, the highest tribunal in the land, and to whose decree all will bow with cheerful acquiescence. But, until such authoritative construction of the law in their favor, I must decline to approve of this claim, as at present advised.

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